INDEX





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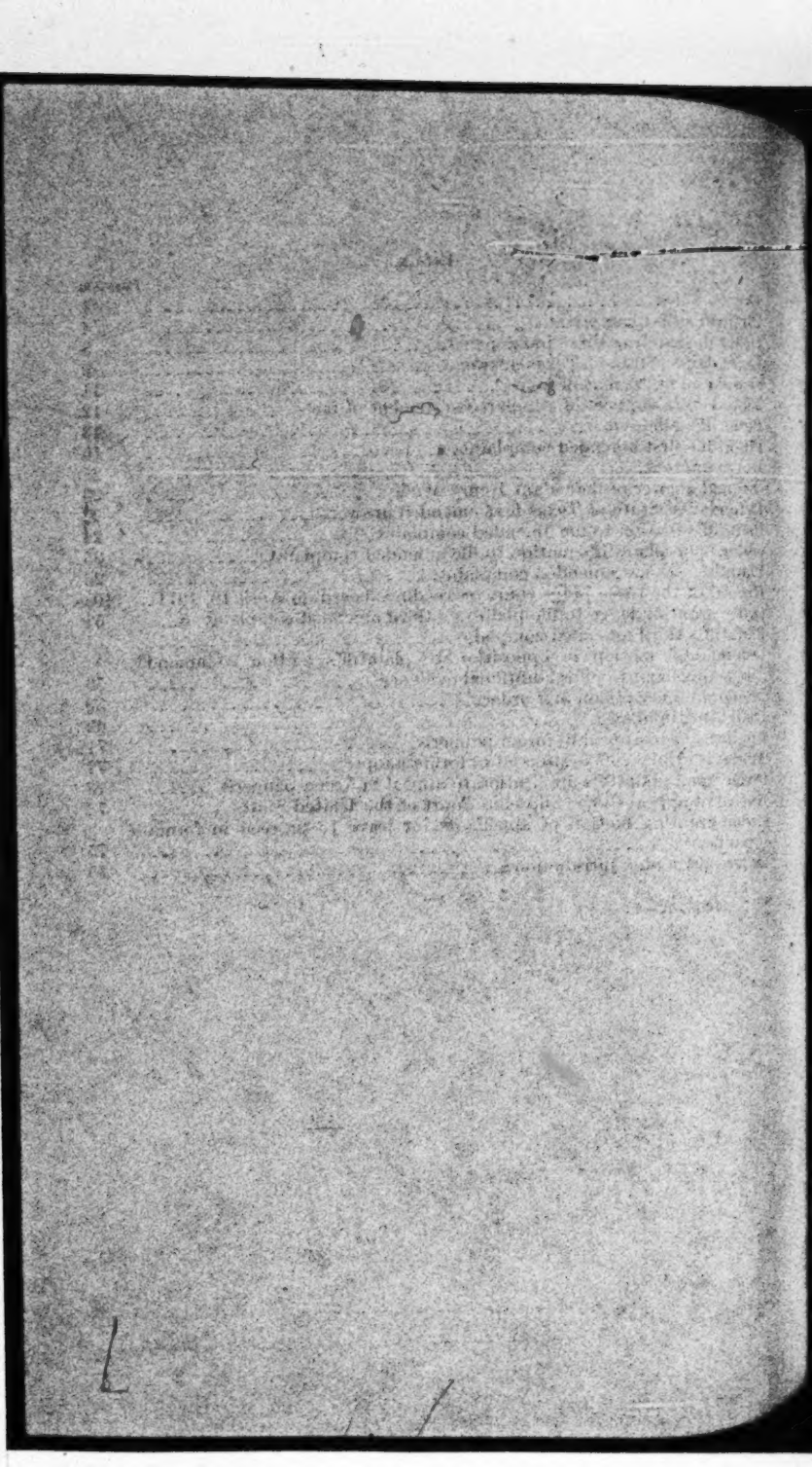

Civil Docket

United States District Court

CA-3-4336-B

*Sarah T. Hughes*, Judge *Robert M. Hill*, Judge *Homer Thornberry*

LINDA R. S., SUING ON BEHALF OF HERSELF AND HER MINOR DAUGHTER, AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

v.

RICHARD D., AND THE STATE OF TEXAS

ED: HENRY WADE & JUSTICE ROBERT CALVERT 3/71

*Attorneys*

McKool, McKool, Jones, Shoemaker & Turley. By: Windle Turley, 2000 McKool Building, 5025 North Central Expressway, Dallas, Texas 75205 521-750, for plaintiff.

*Pat Bailey*, P.O. Box 12548, Capitol Station, Austin, Texas 78711, for State of Texas; for defendant.

*John B. Tolle*, Assistant District Attorney, Dallas County Courthouse, Dallas, Texas 75202, for Henry Wade;

| Statistical record | Costs | Date | Name or receipt No. | Rec. | Disb. |
|---|---|---|---|---|---|
| | | *1970* | | | |
| J. S 5 mailed Dec. 31, 1970. | Clerk..... | 12-3 | M.M.J.S.. | 1500 | ..... |
| | | 12-15 | SF201 CL ..... | | 1500 |
| | | *1971* | | | |
| J.S. 6 mailed..... | Marshal.... | 11-30 | Forma Pauperis | ..... | (Appeal) |

Class Action-Request 3-Judge Court. Basis of Action: 9th & 14th. Amendments to U.S. Constitution. Seek Declaratory Judgment. Holding Texas Child Support Laws. Action arose at; unconstitutional. Injunctive relief; costs.

Docket fee.....

Witness fees.

Depositions.....

| Date | Proceedings |
|---|---|
| 1970 | |
| Dec. 3 | File plaintiff's first complaint and issued summonses (2)—The State served by serving the Attorney General and the Governor. |
| Dec. 8 | Filed marshal's return on summons executed December 5, 1970 by serving Richard Dobenbaugh, Jr. by delivering to Barry Bearden, assistant. |
| Dec. 14 | Filed marshal's return on summons (2) both executed December 9, 1970 by serving Alfred Walker, designated agent for Attorney General Crawford C. Martin; and by serving Bob Bullock, designated agent for the office of the Governor. |
| Dec. 18 | Filed order designating Judges Hill and Thornberry for 3 judge panel. JRH. |
| Dec. 22 | Filed answer of State of Texas. |
| 1971 | |
| Feb. 26 | Filed brief for plaintiffs (copy sent to all judges). |
| Mar. 15 | Filed brief for State of Texas. |
| Mar. 22 | Filed stipulated statement of facts. |
| Mar. 22 | Filed affidavits of Robert Goldsteinberg, Albert Dunagan, Linda R. S. and testimony of Burton G. Hackney in support of allegations. |
| Mar. 23 | Filed pl's first amended complaint with leave granted by STH, adding Henry Wade and Justice Robert Calvert as defendants. |
| Mar. 25 | Issued summons to Henry Wade and Justice Calvert and given to U.S. Marshal. |
| Mar. 29 | Filed marshal's return on amended complaint executed Mar. 26, 1971 by serving Henry Wade, Dallas Co. D.A., by del. to Douglas Mosher. |
| Apr. 2 | Filed original answer of defendant Henry Wade. |
| Apr. 5 | Filed defendants (State of Texas) first amended answer. |
| Apr. 6 | Filed plaintiff's motion to file amended complaint and order granting. STH |
| Apr. 6 | Filed plaintiff's second amended complaint. |
| Apr. 20 | Filed marshal's return on amended complaint executed Apr. 19, 1971 by serving Chief Justice Robert Calvert by del. to G. R. Jackson. |
| May 26 | Filed order granting plaintiff leave to file third amended complaint. STH. |
| May 28 | Filed plaintiff's third amended complaint. |
| June 3 | Filed by State of Texas motion in opposition to plaintiff's motion to amend pleadings and to offer additional evidence. |
| Nov. 1 | Filed memorandum opinion and order by Judges Thornberry and Hill. |
| Nov. 1 | Filed dissenting opinion by Judge Hughes. Copies mailed to attorneys. |

| Date | Proceedings |
|---|---|
| 1971 | |
| Nov. 10 | Filed plaintiff's application to appeal in forma pauperis. |
| Nov. 29 | Filed order granting plaintiff's application to appeal in forma pauperis FMH: Magistrate. |
| Nov. 29 | Filed plaintiff's notice of appeal to the Supreme Court of the United States. |
| Dec. 15 | Filed plaintiff's 4th amended complaint and first supplemental brief. |
| Dec. 16 | Filed transcript of proceedings held April 16, 1971 (Hearing). |
| 1972 | |
| Jan. 10 | Mailed complete record to Supreme Court with transcript. (No exhibits). |
| Jan. 11 | Filed Copy 5 of CJA 21. Original mailed to Administrative Office by Odell Oliver. |
| Feb. 15 | Filed motion to intervene by State of Texas. |
| Mar. 8 | Filed order directing all parties to file briefs by April 15, 1972. Reply to be filed 10 days after brief is filed if so desire to file a reply brief. Deposition of plaintiff shall be taken at a convenience to the parties.<br>(Copy mailed to attorneys of record). |
| Apr. 17 | Filed intervenor's brief. |
| Apr. 24 | Filed certified copy of order from Supreme Court: "Upon consideration of the motion of the appellants for leave to proceed herein in forma pauperis, it is Ordered by this Court that the said motion be, and it is hereby, granted." |
| Apr. 26 | Filed certified copy of order from the Supreme Court: "The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits." |
| May 1 | Filed plaintiff's second supplemental brief. |

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

LINDA R. S., suing on behalf of herself and her minor daughter, and on behalf of all others similarly situated, Plaintiff,

*v.*

Richard D., and the State of Texas, Defendants.

Civil Action No. 3-4336-B (Filed December 3, 1970)

## Plaintiff's First Complaint

### I. PARTIES

1. Plaintiff, Linda R. S. is a citizen of the State of Texas, and a resident of Dallas County, Texas.

2. Plaintiff's minor daughter is a citizen of the State of Texas and resides with Plaintiff in Dallas County, Texas.

3. Plaintiff sues on behalf of herself, her minor daughter, and on behalf of all other women and minor children who have sought, are seeking, or in the future will seek to obtain support for so-called illegitimate children from said child's father. The number of members of the class is large and joinder of all members is impractical; there are questions of law and fact common to each class; the claims of Plaintiff are typical of such class; and the named Plaintiff will fairly and adequately protect the interests of the class.

4. Defendant, Richard D., is a citizen of the State of Texas and a resident of Dallas County, Texas.

5. Defendant, State of Texas, is a party hereto in that certain laws and enactments of the State of Texas infringe the Federal Constitutional rights of Plaintiff, Plaintiff's minor daughter, and others similarly situated. Notice of this suit is given to Honorable Preston Smith, Governor of the State of Texas, and to Honorable Crawford Martin, Attorney General for the State of Texas.

## II. JURISDICTION

1. Plaintiff invokes the jurisdiction of this Court under the NINTH and FOURTEENTH Amendments to the United States Constitution; and under Title 28, United States Code, Sections 1331, 1343, 2201, 2202, 2281, and 2284; and Title 43, United States Code, Section 1983.

2. Plaintiff seeks (a) a Declaratory Judgment that Article 4.02 of the Texas Family Code, and Article 602 of the Texas Penal Code are unconstitutional on their face, and have been unconstitutionally applied so as to systematically exclude unwed mothers and children of unwed mothers from the benefits of such laws; (b) a permanent mandatory injunction to prevent the further exclusion of such class of persons from the protection of the laws of the State of Texas.

## III. STATUTES

1. Article 4.02 of the Texas Family Code provides:

> *"Each spouse has the duty to support his or her minor children.* The husband has the duty to support the wife and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to those to whom support is owed."

2. Article 602 of the Texas Penal Code provides:

> "Any husband who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years."

## IV. FACTS

1. Plaintiff and Defendant, Richard D., cohabited for a period of several months in 1969 and 1970 during which time Plaintiff became pregnant by the Defendant, Richard D.

2. On October 3, 1970, Plaintiff gave birth to a girl baby, of which child Richard D. is the father.

3. Although requested by Plaintiff many times to do so, Defendant, Richard D., has refused to either marry Plaintiff or support their minor daughter.

4. Plaintiff has very little money and cannot support the parties' minor daughter in a manner equal to the opportunities and privileges of a father supported child.

5. Plaintiff's minor daughter is not entitled to receive and in all reasonable probability will not receive support from any source other than her natural parents.

6. The laws of Texas as written and as applied give the Plaintiff's child no rights of support from her father, but said laws do provide other children that right against a father who has married the child's mother.

7. Unless this Court requires Defendant, Richard D., to contribute to the support and upkeep of his minor daughter said child will experience great economic hardship for the next eighteen (18) years, which hardships she would not otherwise have to endure, and which will deprive her of equal privileges and opportunities of similarly situated father supported children.

8. Plaintiff, Linda R. S. has been and will continue to be subjected to economic coercion by the State of Texas in that she recognizes that her child cannot be raised with equal rights and opportunities such as similarly situated father supported children.

9. Because of such state enforced economic hardship, Plaintiff and others similarly situated are not permitted to freely elect between keeping and rearing their child and the alternatives of placing that child for adoption or even having its birth aborted.

10. Unless Defendant, Richard D., be required to contribute to the support of such child, Plaintiff will be required to choose between giving her child up for adoption and rearing by other parties, or subjecting the child to a life of unequal rights, unequal opportunities, and unequal support as compared to father supported children.

11. This is a proper case to be heard by a Three-Judge Court in that Plaintiff is challenging state statutes as invalid on their face under the United States Constitution, and is seeking an injunction against the discriminatory enforcement of said statutes, and is of significant public concern.

## V. CAUSES OF ACTION

1. The child support provision of Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code are unconstitutional on their face.

2. Said statutes deprive unwed pregnant women and unwed mothers of their federal constitutional rights as guaranteed in the NINTH and FOURTEENTH Amendments to the United States Constitution, to-wit:

A. Said Texas statutes, laws and customs have deprived Plaintiff of the fundamental rights of all women to freely choose whether to bear children.

B. They deprive Plaintiff of the fundamental right of all mothers to freely choose whether to keep their children.

C. Said statutes, laws and customs deny Plaintiff equal protection of the laws.

D. Said Texas statutes, laws and customs deny, without due process of law, Plaintiff's rights to have and keep her child.

3. Said Texas statutes, laws and customs deprive Plaintiff's minor daughter, and other children of unwed mothers of their Federal Constitutional rights protected by the NINTH and FOURTEENTH Amendments to the United States Constitution, to-wit:

A. They deprive said child of the equal protection of the laws.

B. They deprive said child of the fundamental right of all children to support from their natural father.

C. Said statutes deny, without due process of law said child's fundamental rights of equal opportunities and privileges of other children receiving support from their fathers.

4. Provisions of Article 4.02 of the Texas Family Code and of Article 602 of the Texas Penal Code discriminate against the Plaintiff's minor child solely because of circumstances surrounding the child's conception. Said statutes are not supported by any overriding and compelling state interest and in fact operate to the detriment of the citizens of Texas who often must ultimately bear the support of said children.

VI. RELIEF REQUESTED

1. Plaintiff prays that a Three-Judge Court be convened to hear this cause.

2. Plaintiff prays that a Declaratory Judgment be issued holding the Texas Child Support Laws unconstitutional on their face as written.

3. Plaintiff prays that a permanent mandatory injunction issue, requiring the State of Texas to cease its discriminatory application of its Child Support Laws, and that Defendant, Richard D., be required to pay a reasonable amount of money for the support of his child, that Defendants be compelled to pay costs of Court, and such further relief at law or in equity as Plaintiff may be entitled to receive.

Respectfully submitted,

*McKool, McKool, Jones, Shoemaker and Turley.*

(By *Windle Turley*, Attorney for Plaintiff, 2000 McKool Building, 5025 North Central Expressway, Dallas, Texas 75205—521-7500).

ORDER DESIGNATING THREE JUDGE PANEL

[Number and title omitted] (Filed December 18, 1970)

The Requesting Judge (1) above named to whom an application for relief has been presented in the above cause having notified me that the action is one required by Act of Congress to be heard and determined by a District Court of three Judges, I, John R. Brown, Chief Judge of the Fifth Circuit, hereby designate the Circuit Judge (3) and District Judge (2) named above to serve with the Requesting Judge (1) as members of, and with him to constitute the said Court to hear and determine the action.

This designation and composition of the three-Judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three-Judge rather than a one-Judge court. This is a matter best determined by the three-Judge Court as this enables a simultaneous appeal to the Court of Appeals and to the Supreme Court without the delay, awkwardness, and administrative insufficiency of a proceeding by way of mandamus from either the Court of Appeals, the Supreme Court, or both, directed against the Chief Judge of the Circuit, the presiding District Judge, or both. The parties will be af-

forded the opportunity to brief and argue all such questions before the three-Judge panel either preliminarily or on the trial of the merits, or otherwise, as that Court thinks appropriate. See Jackson v. Choate, 5 Cir., 1968, 404 F.2d 910, Jackson v. Department of Public Welfare of the State of Florida, S.D. Fla., 1968, 296 F.Supp. 1341; City of Gainesville, Georgia v. Southern Railway Company, N.D. Ga., 1969, 296 F.Supp. 763; Smith v. Ladner, S.D. Miss., 1966, 260 F.Supp. 918; Hargrave v. McKinney, M.D. Fla., 1969, 302 F.2d 1381; Langford v. Barlow [No. 26770], 5 Cir., 1969, 417 F.2d 628, Langford v. Barlow, W.D. Tex., 1969, 304 F.Supp. 657;

JOHN R. BROWN,
*Chief Judge, Fifth Circuit.*

DEFENDANT'S ANSWER

[Number and title omitted] (Filed December 22, 1970)

*To Hon. Judges of said court:*

Comes now the State of Texas, a Defendant in the above styled and numbered cause, represented herein by Crawford C. Martin, Attorney General of Texas, and in reply to Plaintiffs' Complaint, files this its answer and would respectfully show the Court as follows:

I.

The allegations contained in Plaintiffs' Complaint fail to state a cause of action upon which relief can be granted.

II.

A. The Defendant denies the allegations contained in Subparagraph (1) of Paragraph II, Subparagraph (2) of Paragraph II, Subparagraph (6) of Paragraph IV, Subparagraph (8) of Paragraph IV, Subparagraph (9) of Paragraph IV, Subparagraph (11) of Paragraph IV, Paragraph V, and Paragraph VI of Plaintiffs' Complaint.

B. The Defendant admits the allegations contained in Paragraph III of Plaintiffs' Complaint.

C. The Defendant does not have sufficient knowledge or information to admit or deny the allegations contained in Subparagraph (1) of Paragraph I, Subparagraph (2) of Paragraph I, Subparagraph (3) of Paragraph I, Subparagraph (4) of Paragraph I, Subparagraph (1) of Paragraph IV, Subparagraph (2) of Paragraph IV, Subparagraph (3) of Paragraph

IV, Subparagraph (4) of Paragraph IV, Subparagraph (7) of Paragraph IV, and Subparagraph (10) of Paragraph IV of Plaintiffs' Complaint and therefore the same should be taken as denied.

D. The Defendant admits the allegations contained in the last sentence of Subparagraph (5) of Paragraph I of Plaintiffs' Complaint, but the Defendant denies the remaining allegations contained in Subparagraph (5) of Paragraph I of Plaintiffs' Complaint.

E. The Defendant does not have sufficient knowledge or information to either admit or deny the allegations contained in Subparagraph (5) of Paragraph IV of Plaintiffs' Complaint, and the same shall be taken as denied.

III.

The Defendant affirmatively alleges that no provision of the Constitution of the United States, including the Ninth and Fourteenth Amendments thereto, require the State of Texas or the Legislature of the State of Texas to enact legislation to solve every social ill which may be presented. The fact that the State of Texas has not enacted legislation similar to Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code in connection with a parent's responsibility toward illegitimate children is not a valid grounds for invalidating otherwise valid legislation—namely, Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code.

IV.

The Defendant affirmatively alleges that the enactment of Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code is a valid enactment by the Legislature of the State of Texas and is not in conflict with the Constitution of the State of Texas or of the United States.

Wherefore, premises considered, the Defendant, State of Texas, prays that the relief sought by the Plaintiffs be in all things denied.

Respectfully submitted.

CRAWFORD C. MARTIN,
*Attorney General of Texas.*
PAT BAILEY,
*Assistant Attorney General.*
Attorneys for defendant, the State of Texas: P.O. Box 12548. Capitol Station, Austin, Texas 78711.

STIPULATED STATEMENT OF FACT

[Number and title omitted] (Filed March 23, 1971)

1. The Plaintiffs in this case are Linda R. S., individually, and as next friend of her infant daughter, and all other unwed mothers and illegitimate children similarly situated in the State of Texas.

2. The Defendants are Richard D., and The State of Texas. All individual parties are citizens of the State of Texas.

3. For a period of several months in 1969 and 1970 Plaintiff Linda S. and Defendant Richard D. lived together but were never formally married. During this period of time Plaintiff Linda S. became pregnant by Defendant Richard D., and on October 3, 1970, the Plaintiff gave birth to a baby girl. Although Plaintiff requested the Defendant Richard D. to marry her or agree to support his child the Defendant has refused, and continues to refuse to either marry Plaintiff or support the child.

4. The Defendant Richard D. has refused to contribute any aid or support to his child either before its birth or subsequent thereto. The minor infant has continued to live with and be maintained solely by the efforts of its mother Linda S. Although the Plaintiff mother is employed full time she has very little money and cannot support the parties minor daughter in a manner equal to the opportunities and privilages of a comparably situated "father-supported" child.

5. In the year 1969 there were 19,446 illegitimate births reported in the State of Texas representing 8.8 percent of all live births reported that year. There were 3,428 illegitimate births reported in the City of Dallas representing 14.2 percent of all live births in that City the same year. In 1970, 28.6 percent of all children receiving aid for dependent children in the State of Texas were classed as illegitimate by the Texas Department of Public Welfare.

6. In the State of Texas both by statute and common law, a legitimate child is entitled to enforce payments of child support from his father. Illegitimate children in this State are specifically excluded from both statutory and common law benefits of child support payments from their father.

The above and foregoing Statement of Facts is specifically agreed to by Plaintiffs and by the State of Texas to constitute the true findings of fact herein. It is further specifically agreed by the parties hereto that this case may be submitted to the

Court for determination upon the above and foregoing stipulated facts and that a binding judgment be rendered by this Court thereon.

Stipulated and agreed this _____ of February, 1971 by:

/s/ WINDLE TURLEY,
*Attorney of Record for Plaintiffs.*
/s/ PAT BAILEY,
*Assistant Attorney General*
*and Attorney of Record for the State of Texas.*

AFFIDAVITS IN SUPPORT OF STIPULATED STATEMENT OF FACTS

[Number and title omitted] (Filed March 23, 1971)

1. Affidavit of Robert Gerstenberg, Texas Department of Health.
2. Affidavit of Albert Dunagan, City of Dallas Department of Health.
3. Affidavit of Plaintiff.
4. Testimony of Burton G. Hackney before Senate Interim Committee on Welfare Reform.

By WINDLE TURLEY,
*Attorney of Record for Plaintiffs.*

STATE OF TEXAS,
*County of Travis.*

My name is Robert Gerstenberg and I am an official Statistician in the Vital Statistics Office of the Texas Department of Public Health. Part of my duties entail maintaining records of births in the State of Texas. I have examined the records for the year 1969, which is the last year of completed records, and the information set forth herein is true and correct for that year.

In 1969 in the State of Texas there were 19,466 illegitimate births reported out of a total of 220,647 total live births. Illegitimate births in the State of Texas thus represented approximately 8.8 percent of the total live births.

Of the above referenced total live births in 1969, 32,466 of them were of non-white parents out of which number 9,931 were reported as non-white illegitimate births.

ROBERT GERSTENBERG,
*Texas Department of Health,*
*Vital Statistics Department.*

Before me on this the 26th day of February, 1971, personally appeared Robert Gerstenberg known to me to be the person whose name is subscribed hereto and stated to me upon his oath that the above and foregoing Statement is true and correct.

LENA C. MITCHELL,
*Notary Public in and for Travis County, Texas.*

STATE OF TEXAS,
*County of Dallas.*

My name is Albert Dunagan and I am employed by the the City of Dallas Department of Health. Part of my duties involve maintaining and keeping the records of births and deaths in the City of Dallas. I have set forth herein the records for 1969, which are the last available complete records, and they are true and correct to the best of my knowledge.

There were 3,428 illegitimate births reported in the City of Dallas (this does not include the entire County) out of 24,105 total live births reported in the year 1969. These figures represent approximately 14.22 percent rate of illegitimate births per live births. The above figures represent 1,059 illegitimate births out of 16,131 white births reported; 2,229 illegitimates out of 6,082 black births reported; and 140 illegitimates out of 1,892 Mexican-American births reported. The percentage of illegitimates of all live births ranges from 6.6 percent among whites to 36.6 percent among blacks.

ALBERT DUNAGAN,
*City of Dallas,*
*Department of Health, Vital Statistics.*

On this 8th day of March, 1971, personally appeared Albert Dunagan whose name is subscribed to the foregoing and swore upon his oath that he has full knowledge of the above statistics and that they are true and correct.

LUCILLE E. GILLESPIE,
*Notary Public in and for Dallas County, Texas.*

(Filed March 23, 1971)

PLAINTIFF'S AFFIDAVIT

[Number and title omitted]

STATE OF TEXAS,
*County of Dallas.*

My name is Linda R. S. and I am a resident of Dallas, Dallas County, Texas, and was a resident of this County and State at

the time and occurrence of all of the incidents made the basis of this lawsuit.

For a period of several months in 1969 and 1970 I lived with Richard D. although we were never formally married. During this period of time I became pregnant by Richard D. and on October 3, 1970, I gave birth to a baby girl. Although I have requested Richard D. to marry me or agree at least to support his child he has refused to do so, and continues to refuse to either marry me or provide any support for his child. Richard refused to contribute any aid to his child in the form of medical treatment and care prior to its birth, or medical and hospitalization expenses at its birth and he has been unwilling to provide any aid or support since the childs birth. The baby has lived with me continuously since her birth and has been maintained solely by my efforts. I am employed full time but I have little money with which to care for myself and my child and I certainly cannot support our daughter in a manner equal to the care, opportunities and privileges which would be afforded her if she received support from her father.

I have read the above statement of fact and it is fully true and correct.

LINDA R. SHELL.

Before me on this 9th day of March, 1971, personally appeared LINDA S. and represented to me that she had read the above and foregoing statement, and had signed a portion of her name thereto, and that all of the statements and facts set forth in said statement are fully true and correct.

_____, _____,

*Notary Public in and for Dallas County, Texas.*

## SENATE INTERIM COMMITTEE ON WELFARE REFORM

JULY 9, 1970.

Old Supreme Court Room, Capitol Building.

[Testimony by Mr. Burton G. Hackney]

Mr. WILLIAM P. HOBBY. Is there anybody in the audience who would like to appear on this issue of garnishment? Mr. Hackney, do you have any views you would like to share with us?

Mr. HACKNEY. Mr. Chairman, I can give you some personal experience. All of my legal career is spent within 30 miles of

the New Mexico line. During these years we have had an oil field up and down the line on either side of the line. New Mexico does have the provision for the garnishment of wages. We have, through the years, used it many times where a roughneck or a driller is over in New Mexico working on a well. He is actually a citizen of Texas with a judgment against him, and we have used it. I've been accused of being an "old foggy", but I really believe that a person, a father of children, should be charged with their support. And it should be collected. I have a print out from our computer as of March of this year that of all of the children that we have on our rolls at AFDC, 13.38% of them are there because of divorce, 13.90% because of separation, 17.42% because of desertion. Among other reasons, we have 44.70% of our case loads that the fathers of these children are walking the streets of this country without supporting them and have left them to the state to support. Now if you want to add another 28.58% of them that were born out of wedlock, you arrive at about 73.28% of our roll. If we had a strong paternity law, we might be able to have 73% of these children supported by those people who have sired them.

Courts have a tremendous problem. I think those of you who are attorneys can testify to this that we get judgments for mothers in divorce cases for support of children. The father defaults and he comes back into the courts, or the mother does, in contempt proceedings. The courts have one of two alternatives; throw the man in jail or take his promise to pay up and to keep paying. Generally, he will promise to pay and the court will let him go. Within 2 or 3 months the same condition is existing. So, it's one of those things that goes round and round and round. Whether there should be some strengthening in our judicial proceedings for the granting of divorces that would put more teeth in support or just where it should lie. I don't know. I do know that it is a problem. And it, to the taxpayers of this state, is a very costly problem that we need help in solving. I think that is about all I have to say on it.

Mr. HOBBY. Commissioner, did you give an estimate of the percentage of AFDC cases that would be affected? I believe you did; did you not?

Mr. HACKNEY. This is what I am talking about, AFDC cases.

Senator JORDAN. The percentage, I missed it, that you think if we had garnishment would be . . .

Mr. HACKNEY. Well, with desertion, divorce, and separation there is 44.70% and if you add those born out of wedlock, 28.58%, you've got 73.28%.

Senator JORDAN. That is what I mean. Thank you.

## PLAINTIFF'S FIRST AMENDED COMPLAINT

[Number and title omitted] (Filed March 23, 1971)

### I. PARTIES

1. Plaintiff Linda R. S. is a citizen of the State of Texas, and a resident of Dallas County, Texas.

2. Plaintiff's minor daughter is a citizen of the State of Texas and resides with Plaintiff in Dallas County, Texas.

3. Plaintiff sues on behalf of herself, her minor daughter, and on behalf of all other women and minor children who have sought, are seeking, or in the future will seek to obtain support for so-called illegitimate children from said child's father. The number of members of the class is large and joinder of all members is impractical; there are questions of law and fact common to each class; the claims of Plaintiff are typical of such class; and the named Plaintiff will fairly and adequately protect the interests of the class.

4. Defendant, Richard D., is a citizen of the State of Texas and a resident of Dallas County, Texas.

5. Defendant, State of Texas, is a party hereto in that certain laws and enactments of the State of Texas infringe the Federal Constitutional rights of Plaintiff, Plaintiff's minor daughter, and others similarly situated. Notice of this suit is given to Honorable Preston Smith, Governor of the State of Texas, and to Honorable Crawford Martin, Attorney General for the State of Texas.

6. Dallas County District Attorney, Henry Wade, who is given the duty to enforce in Dallas County the provisions of the Texas Penal Code, Article 602.

7. Justice Robert Calvert, Chief Justice of the Texas Supreme Court, the highest Court in the State of Texas and which Court has the duty of interpreting and applying Civil Statute, Article 4.02 of the Texas Family Code.

8. Crawford Martin, Attorney General for the State of Texas, has been given notice of this suit and as appeared herein.

## II. JURISDICTION

1. Plaintiff invokes the jurisdiction of this Court under the NINTH and FOURTEENTH Amendments to the United States Constitution; and under Title 28, United States Code, Sections 1331, 1343, 2201, 2202, 2281, and 2284; and Title 43, United States Code, Section 1983.

2. Plaintiff seeks (a) a Declaratory Judgment that Article 4.02 of the Texas Family Code, and Article 602 of the Texas Penal Code are unconstitutional on their face, and have been unconstitutionally applied so as to systematically exclude unwed mothers and children of unwed mothers from the benefits of such laws; (b) a permanent mandatory injunction to prevent the further exclusion of such class of persons from the protection of the laws of the State of Texas.

3. Although this suit is concerned with a depravation of Plaintiff's civil rights and as such is an exception to the $10,000.00 jurisdictional amount, Plaintiff would nonetheless show the Court that more than $10,000.00 is involved in depriving Plaintiffs of Defendant, Richard D.'s support.

## III. STATUTES

1. Article 4.02 of the Texas Family Code provides:

> *"Each spouse has the duty to support his or her minor children.* The husband has the duty to support the wife and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to those to whom support is owed."

2. Article 602 of the Texas Penal Code provides:

> "Any husband who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years."

IV. FACTS

1. Plaintiff and Defendant, Richard D., cohabited for a period of several months in 1969 and 1970 during which time Plaintiff became pregnant by the Defendant, Richard D.

2. On October 3, 1970, Plaintiff gave birth to a girl baby, of which child Richard D. is the father.

3. Although requested by Plaintiff many times to do so, Defendant, Richard D., has refused to either marry Plaintiff or support their minor daughter.

4. Plaintiff has very little money and cannot support the parties' minor daughter in a manner equal to the opportunities and privileges of a father supported child.

5. Plaintiff's minor daughter is not entitled to receive and in all reasonable probability will not receive support from any source other than her natural parents.

6. The laws of Texas as written and as applied give the Plaintiff's child no rights of support from her father, but said laws do provide other children that right against a father who has married the child's mother.

7. Unless this Court requires Defendant, Richard D., to contribute to the support and upkeep of his minor daughter said child will experience great economic hardship for the next eighteen (18) years, which hardships she would not otherwise have to endure, and which will deprive her of equal privileges and opportunities of similarly situated father supported children.

8. Plaintiff, Linda R. S. has been and will continue to be subjected to economic coercion by the State of Texas in that she recognizes that her child cannot be raised with equal rights and opportunities such as similarly situated father supported children.

9. Because of such state enforced economic hardship, Plaintiff and others similarly situated are not permitted to freely elect between keeping and rearing their child and the alternatives of placing that child for adoption or even having its birth aborted.

10. Unless Defendant, Richard D., be required to contribute to the support of such child, Plaintiff will be required to choose between giving her child up for adoption and rearing by other parties, or subjecting the child to a life of unequal rights, unequal opportunities, and unequal support as compared to father supported children.

11. This is a proper case to be heard by a Three-Judge Court in that Plaintiff is challenging state statutes as invalid on their face under the United States Constitution, and is seeking an injunction against the discriminatory enforcement of said statutes, and is of significant public concern.

## V. CAUSES OF ACTION

1. The child support provision of Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code are unconstitutional on their face.

2. Said statutes deprive unwed pregnant women and unwed mothers of their federal constitutional rights as guaranteed in the NINTH and FOURTEENTH Amendments to the United States Constitution, to-wit:

A. Said Texas statutes, laws and customs have deprived Plaintiff of the fundamental rights of all women to freely choose whether to bear children.

B. They deprive Plaintiff of the fundamental right of all mothers to freely choose whether to keep their children.

C. Said statutes, laws and customs deny Plaintiff equal protection of the laws.

D. Said Texas statutes, laws and customs deny, without due process of law, Plaintiff's rights to have and keep her child.

3. Said Texas statutes, laws and customs deprive Plaintiff's minor daughter, and other children of unwed mothers of their Federal Constitutional rights protected by the NINTH and FOURTEENTH Amendments to the United States Constitution, to-wit:

A. They deprive said child of the equal protection of the laws.

B. They deprive said child of the fundamental right of all children to support from their natural father.

C. Said statutes deny, without due process of law said child's fundamental rights of equal opportunities and privileges of other children receiving support from their fathers.

4. Provisions of Article 4.02 of the Texas Family Code and of Article 602 of the Texas Penal Code discriminate against the Plaintiff's minor child solely because of circumstances surrounding the child's conception. Said statutes are not supported by any overriding and compelling state interest and in fact op-

erate to the detriment of the citizens of Texas who often must ultimately bear the support of said children.

VI. RELIEF REQUESTED

1. Plaintiff prays that a Three-Judge Court be convened to hear this cause.

2. Plaintiff prays that a Declaratory Judgment be issued holding the Texas Child Support Laws unconstitutional in their exclusion of children of unwed parents.

3. Plaintiff prays that a permanent mandatory injunction issue, requiring the State of Texas and its state officers to cease their discriminatory application of Child Support Laws, and that Defendant, Richard D., be required to pay a reasonable amount of money for the support of his child, that Defendants be compelled to pay costs of Court, and such further relief at law or in equity as Plaintiff may be entitled to receive.

Respectfully submitted.

*McKool, McKool, Jones, Shoemaker & Turley.*
/s/ By WINDLE TURLEY,
*Attorney for Plaintiff.*

[Certification of service omitted]

Leave granted, signed "Sarah T. Hughes."

ORIGINAL ANSWER OF DEFENDANT HENRY WADE

[Number and title omitted] (Filed April 2, 1971)

Now comes Henry Wade, Criminal District Attorney of Dallas County, Texas, one of the defendants in the above styled and numbered cause. and makes this his Original Answer herein, and would show the Court:

I

Defendant is the Criminal District Attorney of Dallas County, Texas.

II

Defendant is without knowledge or information sufficient to form a belief as to the following averments in Plaintiff's First Amended Complaint:

(a) That plaintiff is a resident of Dallas County, Texas.

(b) That plaintiff has a minor daughter, and if so, that said minor resides with plaintiff in Dallas County, Texas.

(c) That plaintiff represents a class, if any.

(d) That defendant RICHARD D. is a resident of Dallas County, Texas.

(e) That plaintiff and RICHARD D. cohabited for several months during 1969 and 1970, and that plaintiff became pregnant by RICHARD D.

(f) That RICHARD D. has refused to marry plaintiff or support their minor daughter, if any.

(g) That plaintiff is financially unable to support her minor daughter, if any.

(h) That plaintiff's minor daughter, if any, is not entitled to receive and will not receive support from any source other than her natural parents.

(i) That the said minor child, if any, will suffer economic hardship unless RICHARD D. contributes to her upkeep and support.

(j) That plaintiff is not permitted to freely elect between keeping and rearing her child, if any, and placing it for adoption.

(k) That plaintiff will be required to choose between giving the child, if any, up for adoption or subjecting the child to a life of unequal rights, opportunities and support unless RICHARD D. is required to contribute to the support of such child, if any.

III

Defendant denies that Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code are unconstitutional for any of the reasons set forth in *Section V—Causes of Action* at pages 4 and 5 of Plaintiff's First Amended Complaint, and says that the said statutes are clearly and narrowly drawn and do not offend in any way against the provisions of the Constitution of the United States.

Wherefore, defendant Henry Wade prays that plaintiff's application for relief be in all things denied, and that defendant have and recover against plaintiff his costs in this behalf expended.

JOHN B. TOLLE,
*Assistant District Attorney,*
Dallas County Courthouse, Dallas, Texas 75202.

HENRY WADE,
*Attorney for Defendant.*

[Certification of service omitted.]

## Defendants' First Amended Answer

[Number and title omitted]

(Filed April 5, 1971)

To Hon. Judges of said court:

Comes now the State of Texas, a Defendant in the above styled and numbered cause, represented herein by Crawford C. Martin, Attorney General of Texas, and in reply to Plaintiffs' Second Amended Complaint, files this its First Amended Answer and would respectfully show the Court as follows:

I.

The allegations contained in Plaintiffs' Second Amended Complaint fail to state a cause of action upon which relief can be granted.

II.

The allegations contained in Plaintiffs' Second Amended Complaint fail to allege or show grounds giving this Court jurisdiction.

III.

The allegations contained in Plaintiffs' Second Amended Complaint fail to adequately show that the amount involved in the controversy is sufficient to give the Court jurisdiction.

IV.

A. The Defendant denies the allegations contained in Subparagraph (1) of Paragraph II, Subparagraph (2) of Paragraph II, Subparagraph (3) of Paragraph II, Subparagraph (6) of Paragraph IV, Subparagraph (8) of Paragraph IV, Subparagraph (9) of Paragraph IV, Subparagraph (11) of Paragraph IV, Paragraph V, and Paragraph VI of Plaintiffs' Second Amended Complaint.

B. The Defendant admits the allegations contained in Paragraph III of Plaintiffs' Second Amended Complaint.

C. The Defendant does not have sufficient knowledge or information to admit or deny the allegations contained in Subparagraph (1) of Paragraph I, Subparagraph (2) of Paragraph I, Subparagraph (3) of Paragraph I, Subparagraph (4) of Paragraph I, Subparagraph (1) of Paragraph IV, Subparagraph (2) of Paragraph IV, Subparagraph (3) of Paragraph IV, Subparagraph (4) of Paragraph IV, Subparagraph (7) of Paragraph IV, and Subparagraph (10) of Paragraph IV of

Plaintiffs' Second Amended Complaint and therefore the same should be taken as denied.

D. The Defendant admits the allegations contained in the last sentence of Subparagraph (5) of Paragraph 1 of Plaintiffs' Complaint, but the Defendant denies the remaining allegations contained in Subparagraph (5) of Paragraph 1 of Plaintiffs' Second Amended Complaint.

E. The Defendant does not have sufficient knowledge or information to either admit or deny the allegations contained in Subparagraph (5) of Paragraph IV of Plaintiffs' Second Amended Complaint, and the same shall be taken as denied.

F. The Defendant admits the allegations contained in Subparagraph (6) of Paragraph I of Plaintiffs' Second Amended Complaint that Henry Wade is the Dallas County District Attorney, but the Defendant does not have sufficient knowledge or information to either admit or deny the remaining allegations contained therein.

G. The Defendant admits the allegations contained in Subparagraph (7) of Paragraph I of Plaintiffs' Second Amended Complaint that Robert Calvert is Chief Justice of the Texas Supreme Court, the highest court of civil jurisdiction in the State of Texas, but the Defendant does not have sufficient knowledge or information to either admit or deny the remaining allegations contained therein.

H. The Defendant admits the allegations contained in Subparagraph (8) of Paragraph I of Plaintiffs' Second Amended Complaint that Crawford Martin is Attorney General for the State of Texas and has been given notice of this suit, and Defendant further admits that Crawford Martin has made an appearance herein to the extent of representing the Defendant, State of Texas, but the Defendant denies the remaining allegations contained therein.

V.

The Defendant affirmatively alleges that no provision of the Constitution of the United States, including the Ninth and Fourteenth Amendments thereto, require the State of Texas or the Legislature of the State of Texas to enact legislation to solve every social ill which may be presented. The fact that the State of Texas has not enacted legislation similar to Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code in connection with a parent's responsibility toward illegitimate children is not a valid grounds for invalidating otherwise valid

legislation—namely, Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code.

VI.

The Defendant affirmatively alleges that the enactment of Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code is a valid enactment by the Legislature of the State of Texas and is not in conflict with the Constitution of the State of Texas or of the United States.

VII.

The Defendant affirmatively alleges that the Plaintiffs have failed to allege in what manner or way the District Attorney of Dallas County, Texas, the Chief Justice of the Texas Supreme Court, the Attorney General of the State of Texas, or the State of Texas have the duty to enforce the statutory provisions in question, or have threatened to so enforce such statutory provisions against or to the detriment of the Plaintiffs.

Wherefore, premises considered, The Defendant, State of Texas, prays that the relief sought by the Plaintiffs be in all things denied.

Respectfully submitted.

CRAWFORD C. MARTIN,
*Attorney General of Texas.*
PAT BAILEY,
*Assistant Attorney General.*
*P.O. Box 12548, Capitol Station,*
*Austin, Texas 78711.*
*Attorneys for Defendant, the State of Texas.*

[Certificate of service omitted.]

PLAINTIFF'S MOTION TO FILE AMENDED COMPLAINT

[Number and title omitted] (Filed April 6, 1971)

*To Hon. Judge of said court:*

Comes now Linda R. S., a Plaintiff in the above styled and numbered cause, and files this her Motion for leave to file her Second Amended Complaint and for cause would show the Court the following:

I.

Plaintiff's First Amended Complaint made Henry Wade, Dallas County District Attorney and Justice Robert Calvert, Chief Justice of the Texas Supreme Court, additional parties herein but did not specify that they were Defendant parties which was in fact Plaintiff's intent. Plaintiff's Second Amended Complaint differs from her First Amended Complaint only in that Plaintiff has added language to Paragraph 6, 7 and 8 on Pages 1 and 2 to make clear her intent that said parties be treated as Defendants herein.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that leave be granted to file this her Second Amended Complaint.

Respectfully submitted.

*McKool, McKool, Jones, Shoemaker & Turley.*
BY WINDLE TURLEY,
*Attorney for Plaintiff.*

ORDER UPON PLAINTIFF'S MOTION TO FILE AMENDED COMPLAINT

Leave is hereby granted this ——— day of April, 1971, to Plaintiff to file her Second Amended Complaint.

———— ————,
*Judge.*

(Original signed by Judge Sara T. Hughes on April 6, 1971).

PLAINTIFF'S SECOND AMENDED COMPLAINT

[Number and title omitted] (Filed April 6, 1971)

I. PARTIES

1. Plaintiff, Linda R. S. is a citizen of the State of Texas, and a resident of Dallas County, Texas.

2. Plaintiff's minor daughter is a citizen of the State of Texas and resides with Plaintiff in Dallas County, Texas.

3. Plaintiff sues on behalf of herself, her minor daughter, and on behalf of all other women and minor children who have sought, are seeking, or in the future will seek to obtain support for so-called illegitimate children from said child's father. The number of members of the class is large and joinder of all members is impractical; there are questions of law and fact common to each class; the claims of Plaintiff are typical of such class;

and the named Plaintiff will fairly and adequately protect the interests of the class.

4. Defendant, Richard D., is a citizen of the State of Texas and a resident of Dallas County, Texas.

5. Defendant, State of Texas, is a party hereto in that certain laws and enactments of the State of Texas infringe the Federal Constitutional rights of Plaintiff, Plaintiff's minor daughter, and others similarly situated. Notice of this suit is given to Honorable Preston Smith, Governor of the State of Texas, and to Honorable Crawford Martin, Attorney General for the State of Texas.

6. Dallas County District Attorney, Henry Wade, who is given the duty to enforce in Dallas County the provisions of the Texas Penal Code, Article 602, is made a Defendant herein.

7. Justice Robert Calvert, Chief Justice of the Texas Supreme Court, the highest Court in the State of Texas and which Court has the duty of interpreting and applying Civil Statute, Article 4.02 of the Texas Family Code, is made a Defendant herein.

8. Crawford Martin, Attorney General for the State of Texas, has been given notice of this suit and appeared herein, and is made a Defendant herein.

## II. JURISDICTION

1. Plaintiff invokes the jurisdiction of this Court under the NINTH and FOURTEENTH Amendments to the United States Constitution; and under Title 28, United States Code, Sections 1331, 1343, 2201, 2202, 2281, and 2284; and Title 43, United States Code, Section 1983.

2. Plaintiff seeks (a) a Declaratory Judgment that Article 4.02 of the Texas Family Code, and Article 602 of the Texas Penal Code are unconstitutional on their face, and have been unconstitutionally applied so as to systematically exclude unwed mothers and children of unwed mothers from the benefits of such laws; (b) a permanent mandatory injunction to prevent the further exclusion of such class of persons from the protection of the laws of the State of Texas.

3. Although this suit is concerned with a deprivation of Plaintiff's civil rights and as such is an exception to the $10,000.00 jurisdictional amount, Plaintiff would nonetheless show the Court that more than $10,000.00 is involved in depriving Plaintiffs of Defendant, Richard D.'s support.

### III. STATUTES

1. Article 4.02 of the Texas Family Code provides:

> *"Each spouse has the duty to support his or her minor children.* The husband has the duty to support the wife and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to those to whom support is owed."

2. Article 602 of the Texas Penal Code provides:

> "Any husband who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years."

### IV. FACTS

1. Plaintiff and Defendant, Richard D., cohabited for a period of several months in 1969 and 1970 during which time Plaintiff became pregnant by the Defendant, Richard D.

2. On October 3, 1970, Plaintiff gave birth to a girl baby, of which child Richard D. is the father.

3. Although requested by Plaintiff many times to do so, Defendant, Richard D., has refused to either marry Plaintiff or support their minor daughter.

4. Plaintiff has very little money and cannot support the parties' minor daughter in a manner equal to the opportunities and privileges of a father supported child.

5. Plaintiff's minor daughter is not entitled to receive and in all reasonable probability will not receive support from any source other than her natural parents.

6. The laws of Texas as written and as applied give the Plaintiff's child no rights of support from her father, but said laws do provide other children that right against a father who has married the child's mother.

7. Unless this Court requires Defendant, Richard D., to contribute to the support and upkeep of his minor daughter said

child will experience great economic hardship for the next eighteen (18) years, which hardships she would not otherwise have to endure, and which will deprive her of equal privileges and opportunities of similarly situated father supported children.

8. Plaintiff, Linda R. S. has been and will continue to be subjected to economic coercion by the State of Texas in that she recognizes that her child cannot be raised with equal rights and opportunities such as similarly situated father supported children.

9. Because of such state enforced economic hardship, Plaintiff and others similarly situated are not permitted to freely elect between keeping and rearing their child and the alternatives of placing that child for adoption or even having its birth aborted.

10. Unless Defendant, Richard D., be required to contribute to the support of such child, Plaintiff will be required to choose between giving her child up for adoption and rearing by other parties, or subjecting the child to a life of unequal rights, unequal opportunities, and unequal support as compared to father supported children.

11. This is a proper case to be heard by a Three-Judge Court in that Plaintiff is challenging state statutes as invalid on their face under the United States Constitution, and is seeking an injunction against the discriminatory enforcement of said statutes, and is of significant public concern.

V. CAUSES OF ACTION

1. The child support provision of Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code are unconstitutional on their face.

2. Said statutes deprive unwed pregnant women and unwed mothers of their federal constitutional rights as guaranteed in the NINTH and FOURTEENTH Amendments to the United States Constitution, to-wit:

A. Said Texas statutes, laws and customs have deprived Plaintiff of the fundamental rights of all women to freely choose whether to bear children.

B. They deprive Plaintiff of the fundamental right of all mothers to freely choose whether to keep their children.

C. Said statutes, laws and customs deny Plaintiff equal protection of the laws.

D. Said Texas statutes, laws and customs deny, without due process of law, Plaintiff's rights to have and keep her child.

3. Said Texas statutes, laws and customs deprive Plaintiff's minor daughter, and other children of unwed mothers of their Federal Constitutional rights protected by the NINTH and FOURTEENTH Amendments to the United States Constitution, to-wit:

A. They deprive said child of the equal protection of the laws.

B. They deprive said child of the fundamental right of all children to support from their natural father.

C. Said statutes deny, without due process of law said child's fundamental rights of equal opportunities and privileges of other children receiving support from their fathers.

4. Provisions of Article 4.02 of the Texas Family Code and of Article 602 of the Texas Penal Code discriminate against the Plaintiff's minor child solely because of circumstances surrounding the child's conception. Said statutes are not supported by any overriding and compelling state interest and in fact operate to the detriment of the citizens of Texas who often must ultimately bear the support of said children.

## VI. RELIEF REQUESTED

1. Plaintiff prays that a Three-Judge Court be convened to hear this cause.

2. Plaintiff prays that a Declaratory Judgment be issued holding the Texas Child Support Laws unconstitutional in their exclusion of children of unwed parents.

3. Plaintiff prays that a permanent mandatory injunction issue, requiring the State of Texas and its state officers to cease their discriminatory application of Child Support Laws, and that Defendant, Richard D., be required to pay a reasonable amount of money for the support of his child, that Defendants be compelled to pay costs of Court, and such further relief at law or in equity as Plaintiff may be entitled to receive.

Respectfully submitted.

*McKool, McKool, Jones, Shoemaker and Turley,*
By WINDLE TURLEY,
*Attorney for Plaintiff.*

[Certificate of service omitted.]

[2] INDEX OF PROCEEDINGS

[Number, title and appearances omitted from this record of the Three Judge Court proceedings heard on April 16, 1971]



[3] PROCEEDINGS

Dallas, Texas, April 16, 1971.

The MARSHAL. Hear ye, hear ye, hear ye, the Honorable Homer Thornberry, the Honorable Sarah T. Hughes, and the Honorable William Robert Hill presiding, holding a special session of the Dallas Division is opened according to law and pursuant to adjournment.

Let us pray. Almighty God, earnestly and humbly do we pray that Thou wilt keep these United States and this Honorable Court in Thy holy protection. Amen. Be seated, please.

Judge THORNBERRY. I call CA-3-4336-B, Linda R. S., et al versus Richard D. and the State of Texas, and I ask Counsel please to announce for the record and state how much time you think will be required.

Mr. TURLEY. Plaintiff is ready, Your Honor, and I believe if I could have about 20 minutes to make an opening statement and 10 minutes for rebuttal, if that's satisfactory with the Court, that would be sufficient time.

Judge THORNBERRY. Maybe we won't need that long. I'll say 15 minutes.

Mr. TURLEY. I'll try not to take that much time, Your Honor.

Judge HUGHES. Will you state your name, please.

[4] Mr. TURLEY. Windle Turley for the Plaintiff.

Mr. BAILEY. Pat Bailey for the State of Texas. This time will be ample—20 minutes, Your Honor, or less.

Mr. TOLLE. I'm John Tolle for the Defendant, Henry Wade, and I will defer to the State as far as the time.

Judge THORNBERRY. All right.

All right, Mr. Turley.

Mr. TURLEY. Thank you, Your Honor. May it please the Court——

Judge THORNBERRY. If you will start out, please, and tell us exactly what you are asking this Court to do.

Mr. TURLEY. Your Honor, we are asking this Court to grant a mandatory injunction against the State of Texas to forbid them from continuing to exclude children of unwed mothers from the benefits and support provisions of the Texas Child Support laws.

There are two specific statutes in question, Your Honor. One is Article 602 of the Texas Penal Code, which provides for a misdemeanor in the event of the failure of a father to support his child. The other statute in question is Article 4.02 of the Texas Family Code, which provides that a spouse will support his child.

Judge THORNBERRY. Are you attacking the [5] constitutionality of these statutes?

Mr. TURLEY. Your Honor, we are attacking them only in the context that they exclude certain individuals from their provisions.

Judge THORNBERRY. Can we grant any kind of injunctive relief when you're not attacking the constitutionality of these statutes?

Mr. TURLEY. I believe you can, Your Honor. We ask that the Court simply instruct and restrain the public officials of the State of Texas from continuing to refuse to permit illegitimate children from the benefits of these statutes. We feel that it's not necessary that the Court go so far as to actually strike down the entire statute as unconstitutional. We merely believe they are unconstitutional in the way that they are being applied so as to systematically exclude certain individuals of this State from their benefits.

Judge HUGHES. Why is 402 involved at all—because we don't have a spouse here?

Mr. TURLEY. That's exactly the point, Your Honor. On its face it provides benefits to the children of married individuals. It provides that if a father refuses to support that child, then the child can have a cause of action brought in court. No such provision is made any place in the State of Texas for [6] an illegitimate child, and we contend that this kind of systematic exclusion constitutes a denial of that child's equal protection of the law.

Judge Hughes. You're really asking us to write a new statute, because 402 simply does not apply to the fathers of illegitimate children.

Mr. Tuller. That's true, Your Honor, and as I said—I would hope the Court would be willing to simply say that the State of Texas should cease from excluding this group—illegitimate children—from the benefits of the laws which have been enacted by this State. If, however, Your Honor, because of the magnitude of the problem—the fact that some 20,000 illegitimate children are being born in this state every year; because of the seriousness of the Civil Rights involved, I would be willing to ask the Court to go ahead and declare the entire statute unconstitutional and to be remedied by the Legislature.

I think the Court has the facts in the case in mind here, Your Honor, they simply are that the Plaintiff brings this action on behalf of herself and her minor child and on behalf of all other similarly situated. She became pregnant and gave birth to a child when she was not married; the father refused to support the child and refused to marry her; he has been made a [7] party to this action but has not appeared or answered herein.

The issue then as we have stated is whether it is constitutional under the constitutional provisions for the State of Texas to exclude this illegitimate child from the protection and benefits of the Texas Child Support laws, while they go ahead and include and provide these same benefits to a legitimate child. We believe, Your Honor, that the exclusion is unconstitutional on the basis of two parts of the Constitution, both as to the mother and as to the child.

First, under the Fourteenth Amendment, the child's rights as well as the mother's rights are violated in that they are both denied equal protection of the law and they are both denied due process of law.

Under the Ninth Amendment we feel that they are both being denied basic fundamental rights which accrue to them particularly with respect to the mother's right of freedom of choice, and that a child being—as we will show the Court—condemned to a place of almost corruption of the blood where he is suffering from something that he had no control over and being inflicted with this kind of punishment is something that he had absolutely nothing to do with.

As to the first point, Your Honor, I would [8] like to just underscore momentarily the magnitude and the seriousness of the problem that we're facing. Nationally, the 300,000 illegitimate children are reported each year, at a rate that will reach something like 400,000 in 1980—one in 7 in 1969 live births in this nation were illegitimate children. In Dallas alone some 3,428 illegitimate births were reported last year. This represents almost 15% of the live birth population in this City. In the State of Texas it's something in excess of 19,000 in 1969 representing almost 9% of the live births in the State. This is a problem that is compounding itself by tremendous leaps each year. Thus the magnitude of the problem involved in sheer numbers as well as the magnitude of the Civil Rights involved, we believe, compel this Court or should compel this Court to examine the constitutional violations that we have observed.

Judge HUGHES. Do you think that this is a 3-Judge court case? You're not asking for the statute to be declared unconstitutional. You are just asking for us to interpret the statute so that it will include illegitimate children, and the statute with regard to 3-Judge court cases says that it's only when you are asking for the statute to be declared unconstitutional.

Mr. TUBLEY. That's true, Your Honor, or [9] seeking to prevent it from being unconstitutionally applied and that's what we're trying to do here.

Judge HUGHES. That isn't what it says.

Judge THORNBERRY. It says "an interlocutory or permanent injunction restraining enforcement, operation, or execution of any State statute by restraining the action of any officers of such State in the enforcement or execution of such statute or of an Order made by an Administrative Board or Commission acting under State statute shall not be granted by any District Court or Judge hereof upon the grounds of the unconstitutionality of such statute unless the application therefor is heard and determined by a District Court of three Judges under Section 2284 of this Act."

Mr. TUBLEY. Your Honor, we feel we come within those specific words and the provisions of that statute and we are asking this Court to compel the State officials to stop refusing to permit illegitimate children from having the same rights that are granted under the Texas Child Support provisions to legitimate children. This is what we define as a mandatory

injunction rather than a straight injunction whereby we are asking that they be restrained from doing an active act; we are asking at this time, Your Honor, that the State officials be restrained from their continued [10] passive refusal to permit the illegitimate child to participate in these benefits.

Judge THORNBERRY. I don't want to take up all your time with questions, but isn't the situation changed a little bit by the fact that Courts have interpreted the statute—the State Courts?

Mr. TURLEY. The statute in question?

Judge THORNBERRY. Yes.

Mr. TURLEY. No, I don't believe so, Your Honor. I don't believe there's any dispute between the Plaintiff and the State with respect to the provisions of the State statute. They acknowledge that there is no right in the State of Texas for an illegitimate to have child support provisions enforced under the law.

Judge THORNBERRY. Hasn't some court of the State of Texas interpreted it to say that it does not include illegitimate children?

Mr. TURLEY. Yes, they have, Your Honor. In 1966 the Texas Supreme Court—Infants Home versus——

Judge THORNBERRY. Doesn't that present some complication here that this Court is going to say to the highest court of the State, "You've interpreted this statute wrong"?

Mr. TURLEY. Well, Your Honor, no—I don't see that there is any complication. I think that's it [11] exactly—that they have interpreted it wrong. It has been the law in this State for many, many years—it's undisputed that that is the law. We just simply contend it's unconstitutional in the way it's being applied, Your Honor, and we ask this Court to grant that kind of direct relief.

If I could just address myself a moment here to the unequal protection provision of the problem before us. Justice Douglas in *Levy* versus *Louisiana* in a recent landmark decision said in particular language pertinent to our case and as they did in that case, "We start from the premises that the illegitimate child is not a non-person. They are humans, live, and have their being. They are clearly persons within the meaning of the Fourteenth Amendment. Having then brought them within the confines of the Fourteenth Amendment and the protection that that Amendment affords, we should then proceed to apply the

equal protection test normally set down by the Supreme Court of this nation, and that is, first, is there discrimination?"

They've got a question that there is in this case, and that point is not disputed by the State of Texas. A legitimate child has a right to support, an illegitimate child does not. That on its face is the discrimination involved.

The second part of the test is whether there is a reasonable basis or any justification to permit that kind of continued discrimination, and if there is such a reasonable basis, is the way that the discrimination is applied overly broad so as to deprive an individual of his liberties unnecessarily.

Judge HUGHES. That isn't the test that is applied in Labine. The test that's applied in Labine is insurmountable barrier.

Mr. TURLEY. Yes, Your Honor.

Judge HUGHES. How are you going to distinguish this case from Labine?

Mr. TURLEY. The Labine case as decided by the Supreme Court a couple of weeks ago, Your Honor, is distinguishable, I think quite clearly from this case, in that in the Labine situation the Court was there dealing with a situation where a Louisiana father had just failed to follow the prescribed procedure in Louisiana for leaving his property to his children. The children then complained that they were discriminated against because the State did not permit them to recover the same as the legitimate child, and in that decision——

Judge HUGHES. There was just one child that was illegitimate.

[13] Mr. TURLEY. That's true, but the man had acknowledged the child, and Louisiana has a very strange procedure, as the Court probably knows, where they have actually three classifications of children—legitimate, natural, and illegitimate, the natural being the category that had been acknowledged by the father. However, he failed to leave a Will, and the Court, Your Honor, particularly Judge Harlan, confirmed an opinion in that case and distinguishes it from the Levy case and from the situation before this Court wherein he says that they are dealing there not with this basic insurmountable confrontation that the illegitimate had in Levy, but they're dealing instead with simply a failure on the part of the intestate to leave his property in the manner prescribed by the State of Louisiana.

As the Court pointed out in its majority opinion there, Your Honor, in Levy and in this situation—the case before this Court—we are dealing with a right that has been created by the State of Texas and in Levy by the State of Louisiana—a right granted to the illegitimate but a right which excluded in Levy and excludes still in Texas the illegitimate. This is distinguishable from the Labine decision in that there you are dealing not with a right granted to the illegitimate, but rather to the decedent, and simply prescribed that he [14] could, if he desired, leave his property to the illegitimate if he followed certain steps, which he didn't do.

Judge THORNBERRY. Is there any problem here that Richard D. has not acknowledged that this child is his?

Mr. TURLEY. I don't see any problem, Your Honor. We had him served and asked that he come and appear before the Court and he did not.

Judge HUGHES. You mean you don't have any stipulation that he has acknowledged the child as his?

Mr. TURLEY. The mother has a sworn affidavit here on file, Judge, for the Court's use.

Judge THORNBERRY. You mean we can find as a fact as against Richard D. and this is his illegitimate child?

Mr. TURLEY. He has defaulted, Your Honor. I don't know what else we could do to get him before the Court. I don't think the Court necessarily has to go that far at this point in considering merely whether the child has a cause of action. I don't think we have to get into the fact issue, but I see no reason why that kind of Judgment could not be entered.

Judge THORNBERRY. Pardon me—if some of you'all met somewhere else and stipulated me as the [15] illegitimate's father and subjected me to State prosecution for adultery or something——

Mr. TURLEY. I'm sorry, Your Honor, I didn't hear the question?

Judge THORNBERRY. Go ahead.

Mr. TURLEY. If I could, Your Honor, having then outlined the test to be applied in an equal protection situation, when then proceed to then weigh the rationale of the State's justification for distinguishing the illegitimate out of the class of children and see in connection with that what consequences actually come to bear and what is the nature of the Civil Right of which we contend the illegitimate is being deprived, and I think it's

well-settled by the Supreme Court in *Skinner* versus *Oklahoma*, and in *Griswell* versus *Connecticut* and by the local Courts in *Roe* versus *Wade*, and acknowledged in *Jefferson* versus *Hackney* that in these family matters and in matters involving children we are dealing with some very basic Civil liberties. If that be true, then, what are the consequences involved?

Very briefly—they are both economic and they are socially stigmatic. *Brown* versus the *Board of Education* in 1954 took notice, Your Honor, of the fact that great psychological detriment was being brought to bear upon children who were being discrimi-[16]nated against racially. We contend that this Court can also take notice of the fact that great psychological detriment is being brought to bear upon illegitimate children in the State of Texas. As one psychologist has said, "To be fatherless is hard enough, but to be fatherless with a stigma of illegitimate birth is a psychic catastrophe", and I submit to the Court that that's no exaggeration of the kind of serious problem with which we are confronted.

For example, illegitimate children in one study indicated that naturally they had no father figure, but more surprisingly in more than half the instances they had changed their mother figure more than one time during their rearing.

In addition to that, the studies have indicated that they do substantially worse in school, the only thing they're ahead in is absenteeism. As they grow older and begin to internalize and realize the social problem that they're confronted with, they get progressively worse in all of their academic studies. They have a higher rate of infant mortality at their birth, of juvenile delinquency, and of eroticism.

Finally, it's the economic and minority groups in our communities, Your Honor, that the last able to cope with this kind of a non-support problem, upon whom the [17] burden ultimately most heavily falls, and I might add, not because of this particular economic or minority group—that it participates in sex outside of marriage more often than the other groups in our community, but because of the higher incidences of abortions—something like 83% for white college women compared to 25% for black highschool women; the higher rate of adoption—70% for whites and 4% illegitimates among blacks; and the higher rate of post-pregnancy marriages among whites than blacks—all of these figures ultimately

bring to bear the problem of non-support hardest upon that segment of our community which can least assimilate.

Judge HILL. Mr. Turley, I'm sort of in sympathy with your statistics and your philosophical argument, but I'm concerned about how to get to the problem and I think the Court is too.

Didn't Levy go up through the State Court?

Mr. TURLEY. Yes, it did, Your Honor.

Judge HILL. Why can't you go up through the State Court?

Mr. TURLEY. Your Honor, that is a possibility, and we could, but the problems of just the time and the expense involved—we think that this is the kind of situation that the 3-Judge declaratory action [18] was designed to meet. We think it's a serious problem; the magnitude is growing daily; Texas is one of only two States in this Union that now fails to provide some kind of support—statutory support provisions for illegitimate children, Idaho being the other one.

We could, Your Honor, go that route. We thought this would be more expeditious and in better interest of both the Courts and the litigants.

Finally, to summarize, a summary of probable facts surrounding an illegitimate today in the City of Dallas would reveal that he is 87% of the time black; more often than not in lower income levels; that he comprises by far the largest segment of children receiving Aid to Dependent Children——

Judge THORNBERRY. Mr. Turley, those are things that we recognize. What we are concerned about is what we can do.

I want to be sure now that I understand you. You are saying that you don't want just a Declaratory Judgment, you want some kind of injunctive relief?

Mr. TURLEY. To compel the State officials to permit this mother on behalf of her child to file an action to have the same rights and benefits as a legitimate child in this State. We feel it's just as wrong to take a kind of passive position and discrimi- [19] nate against a person as it is to take an active, affirmative position that has that same kind of detrimental effect.

Judge HUGHES. You are not asking this Court to require Richard D. to pay a reasonable amount for child support?

Mr. TURLEY. We have, Your Honor, but——

Judge HUGHES. Do you think that that ought to go to the State Court?

Mr. TURLEY. I think more expeditiously perhaps in the interest of the Court's time. We would be quite happy to have

that sent to the Domestic Relations Court of this County for determination at the time.

With respect to the problem, Your Honor, *Levy* versus *Louisiana* was confronted with a similar situation wherein the Court finally—just simply held that for the State to exclude the illegitimate from the Wrongful Death Act in that State was an invidious discrimination, and I think that's all that this Court needs to do.

Judge THORNBERRY, All right.

Mr. BAILEY. May it please the Court, I think we need to create a little bit of history in this case because I think it brings to light a few things that I believe should be brought to light. [20] The initial claim in this case was filed against solely the State of Texas asking to hold these particular provisions of the Penal Code and the Family Code as unconstitutional, and I believe in an Amended Pleading it says that the Plaintiffs and their class are asking for these statutes to be declared unconstitutional. They wish also certain injunctive relief.

After the filing of our trial Brief raising quite a few questions as to the jurisdiction of this Court, the Plaintiffs amended their Complaint to bring in certain other parties; namely, the District Attorney, Dallas County, the Chief Justice of the Texas Supreme Court, and the Attorney General of the State of Texas.

I would at the conclusion of this like to move to dismiss the Chief Justice of the Texas Supreme Court——

Judge THORNBERRY. We grant that right now.

Mr. BAILEY. They have not been served, I don't believe, as yet.

Also, in the Amended Pleading a jurisdictional amount of $10,000 was pled, which was not pled in the original. There has been no tender of proof, nor did we stipulate as to any jurisdictional amount being present. In addition, I think there would also be some question of being able to prove this—it's just what the [21] Plaintiff or anyone of them might get, and I don't believe they could aggregate all of their claims.

I think the problem of the Court as presented here is that we just have the State of Texas and the District Attorney of Dallas County being brought into this case at the present time. I think this raises a question that if the Court granted injunctive relief as prayed for by the Plaintiffs, just how would they go about this type of relief? Certainly they could enjoin Mr.

Henry Wade, but how would they enforce this type of injunction against the other District Attorneys around the rest of the State here? They are not parties to this particular suit. If the District Attorney at, say, Austin should decide to proceed under Article 602 of the Penal Code, he is not a party to this suit; the Court could not really enjoin him.

The State of Texas, if the laws keep being enforced this way—who would this Court be holding in contempt? I think this is the problem we've got here—the need for these State officers—if someone ignored in their initial pleadings, and I think what it really boils down to is that they are really asking this Court not to go out and enjoin the Chief Justice of the Texas Supreme Court or the Attorney General or Mr. Henry Wade, but to render an advisory opinion that these statutes [22] are unconstitutional.

Judge HUGHES. Mr. Bailey, with regard to the Civil statute, that simply applies to married people. They are really asking us to write another statute.

Mr. BAILEY. Yes, I think they are.

Judge HUGHES. They are not asking for an interpretation of that statute, but they are asking, as I see it, for us to write a statute which would apply to fathers of illegitimate children.

Mr. BAILEY. I think, Your Honor, what they are really doing—I agree with this—I think what they're really doing is one of two things. They are saying—either you tell the District Attorneys to prosecute the fathers of illegitimate children under 602 or don't prosecute anyone. This is in effect what they are saying, and they're also saying to have this Court make Article 4.02 applicable to illegitimate children or to no one. This is the only alternative they have really given the Court here, short of the Court going in here and trying to enter some type of Order telling the District Attorney when and when he could not file a criminal complaint, whether under 602 or when the District Judges around the State would or would not enforce Article 4.02 of the Family Code, and I think this is the tremendous problem that the Plaintiffs have more or less [23] dumped into this Court's lap and just said, "You come up with some sort of answer here."

To me this very clearly shows two things. It shows the really advisory nature of the relief being sought by the Plaintiff, or two, they are asking this Court to really get into the legislation of a statute that will take care of these illegitimate children.

Let's look at another thing. We've got to have a controversy in a lawsuit here. I think that in the Opinions that I have cited in by Brief, this is one of the elements—that the Federal Courts do not have jurisdiction and should not give merely advisory opinions.

Let's look at the parties that we've got here—the District Attorney. Who is Mr. Henry Wade at this moment threatening to prosecute under 602 of these class of Plaintiffs? No one. They are not being in any way threatened by his saying, "I'm going to prosecute the Plaintiffs." So where is the controversy between this class of Plaintiffs and the District Attorney? He is not threatening to prosecute any of the Plaintiffs. He might conceivably a father, but certainly none of these Plaintiffs, so there's no controversy between them and Mr. Wade.

The Chief Justice of the Texas Supreme Court [24] and the Attorney General—I think neither one of them has responsibility, and I believe the Court has said that they would sustain my Motion with respect to them.

Judge THORNBERRY. Your Motion was as to the Chief Justice, it wasn't as to the Attorney General also.

Mr. BAILEY. Well, in this connection, may it please the Court, we have not been served—granted I have been in court representing the State of Texas.

Judge THORNBERRY. Well, what I wanted to make clear is—our Order of Dismissal is confined to the Chief Justice.

Mr. BAILEY. All right, Sir.

We feel that there is no controversy between the Attorney General of the State of Texas and any of the particular Plaintiffs or their class. First, the Attorney General has no authority to file actions under Article 602, nor does he have any responsibility or duty to file under that or under Article 4.02 of the Family Code. We say there's no controversy, so we come back to this thing—it's an advisory opinion that they're really asking for.

Let's go back and look at the points which I think are important here as to the jurisdiction. One—as the Court is aware—we've cited authority that the jurisdictional requirements of 3-Judge Courts are very [25] strictly construed. They've got to be against an officer of the State and not just the State of Texas. This is not sufficient. I think Counsel is aware of this and is the reason we got the Amendment bringing in certain parties, but the Court decision which I cited in my Brief is that this

officer must be more than a nominal party, and we say that's all the officers in this case are. They are nominal parties to give us a State official. This is, I think, amply borne out by the fact that until our Brief was filed some two weeks ago, they weren't even considered important enough to be made a party to this case. They are nominal.

Consequently, unless you have this, I don't believe this Court has jurisdiction under Section 2281 that they are alleging as grounds.

Let's look at 28 USC 1331 under which they also allege——

Judge HUGHES. What do you think about the fact that this says that "unless the application therefore is heard and determined upon the ground of unconstitutionality of the statute"—I haven't seen yet how they are asking for the statute to be declared unconstitutional?

Mr. BAILEY. Well, Your Honor, I would ask the Court to look at Paragraph 5——

[26] Judge HUGHES. Well, they ask for it, but then when he gets up and states something and states his position, he simply says that he wants us to interpret the statute to include illegitimate children. He has asked for it in his Complaint, but that's really not what he's asking for. He's really asking us to broaden the statute so that it will include illegitimate as well as legitimate children, and that's what gives me concern—that it isn't a case that is provided for under 2281?

Mr. BAILEY. I agree with this. If Counsel is withdrawing his pleadings as to the unconstitutionality, I think he has a question then of a 3-Judge court being proper. Of course, he's also got the hurdle here—if one is not proper—if a 3-Judge Court is not proper here—it would have to go back then to a 1-Judge Court, and then we come to the question of enjoining a State official, which probably only a 3-Judge Court can do. So, I think this is the dilemna he's faced with in this thing and I think probably he's in the wrong forum, when this could more properly come up in the State Court in a particular case.

But the next point—this Section 1331, he's pled jurisdictional amounts which we have denied. There's been no proof tendered or any stipulations asked [27] of us, so under 1331, even though he may have pled a Federal question, he's got to show a jurisdictional amount unless he comes within some exception, and he hasn't pled one here in this particular case. He's pled the declaratory judgment statute, but it doesn't—standing by itself—confer jurisdiction on this Court. I think

this is really what he has asked for here is a declaratory judgment or an advisory opinion, but he's got to base this on some other grounds of jurisdiction.

Now, he's pled 1343, which is your Civil Rights statute. This again doesn't, standing alone, confer jurisdiction upon this Court, and he's gone to 1983, and under this then he's got to have the State official acting under color of State law, and we've just gone this great big vicious cycle again back here, and I think what he's done—he's got a question that he'd like to get before a Court, but I don't think he's before the right one here today.

Judge HILL. Which is the right court?

Mr. BAILEY. I think, Your Honor, the proper way would be to come through the State Court, if he's going mainly after 602—would be in some particular case where they filed on a person under 602, and for this particular Defendant to say "You can't enforce that on me, it's unconstitutional because it's not being enforced [28] against——

Judge HILL. Suppose they won't file?

Mr. BAILEY. Well, Your Honor, I think of course—you mean the District Attorney won't file?

Judge THORNBERRY. Won't accept the Complaint?

Judge HILL. Yes.

Mr. BAILEY. Well, Your Honor, I think we're getting into a situation here that we're in sort of a novel experience—of this Plaintiff's wanting to force the District Attorney to file a criminal Complaint, and I don't know of any case where I ever heard either possibly a State Court in some particular case, but I don't believe I remember one where a Federal Court has ordered a State District Attorney to file a particular criminal action.

Judge THORNBERRY. Would an action for mandamus lie in the State Court—to mandamus a District Attorney to accept a Complaint?

Mr. BAILEY. Counsel here might illicit a little bit more information on that. I think one of the problems you've got there is—he might could do it. The only problem you'd run into there is to exercise a mandamus; the Court would have to show that the man—that the District Attorney didn't exercise his discretion.

[20] Judge THORNBERRY. He didn't exercise his responsibility as provided by law.

Mr. BAILEY. Mandamus doesn't issue if he has a discretion in it, and I think in most of these cases it would be hard to show that he doesn't have discretion as to the evidence and such as this.

Judge HUGHES. Do you think it could be raised in a civil case by the mother filing suit against the father for child support?

Judge HILL. Just in common law?

Judge HUGHES. Yes.

Mr. BAILEY. Yes—it could be brought this way—yes, I think it could.

Now, getting to the merits, I think the main thrust of the Plaintiff's argument as to the so-called unconstitutionality or unconstitutional application of these two statutes are the two companion cases of Levy and Blohm.

As the Court is aware, in there you had a Wrongful Death statute that the Louisiana Courts have said where it said "child", it meant legitimate child. The Supreme Court held this unconstitutional, and this is the main thrust that the Plaintiffs are making here is that this doctrine of Levy should be expanded; that we shouldn't treat the legitimate and the illegitimate in these child support statute cases differently. [30] Before I make a few comments upon Labine, I think that you can understand Labine a little bit more—I feel you can—if you look at what went after Levy and before Labine. In one of the cases of *Jerry Vogel Music Company* versus *Marks Music Company*, which was a 1969 Second Circuit case, I think the opinion of the Court in this case showed some of the real dangers. They did not pass upon this particular issue that we have here or whether Levy was going to be extended to include the father as well as the relationship with the mother, but I think the comment of the Court was—the Court said that this will ultimately probably be decided by the Supreme Court, but I think the Court did sound a warning there that you're talking about literally hundreds of statutes that are going to be affected not only in Texas but in each and every State.

Also, you've got the question of the fact that the common law—the way the common law operates in this particular field. It's a very interesting comment upon it, but even more important was the case that was decided very shortly after Levy, and that was the King case, which this Court is aware of the significance of this case—*King* v. *Smith*—in the welfare area. In

this—while the Court decided *King* v. *Smith* on statutory [31] grounds, Justice Douglas, who wrote the Levy case, concurred in King but on the grounds that Levy should be used in this particular case rather than the grounds that the Court used. The Court did not buy this nor was he joined by any other of the members in his concurring Opinion. So apparently the Court did not wish *King* versus *Smith* to extend the doctrine of Levy, and I think it's pretty important to see why.

In Alabama only legitimate children are entitled to support from their parents. Had the Court felt that Levy gave the right to these children to support from their natural father, then they could not have decided *King* versus *Smith* the way they did; they could not have knocked out the man-in-the-house Rule, because if you look at some of the comments that I quoted in my Brief of the Court in here—they base this upon the fact their decision in there on the statutory is that this child had no right to go against this parent or to look for support. This was the basis that they decided the King case on. With Justice Douglas trying to extend the doctrine of Levy into this case, I think you can see that the Court did not want to extend Levy any further than it had at this time. They had a perfect opportunity, but it would have completely disrupted this welfare concept that they were working on, and it would have either—you would have come to a completely different [32] decision in King because a lot of these children that were put on welfare rolls would not have been eligible if Levy had been extended to it.

Then along comes Labine, which the Court is aware of, and the point there that the Court mentioned is this insurmountable barrier to the child. We submit that there's no showing here in Texas of any insurmountable barrier. Certainly the child cannot avail itself of these two particular statutes, just like the child couldn't avail itself the same as a legitimate child of some of the statutes dealing with descent and distribution in Louisiana, but an insurmountable barrier—we submit not, because here the child—the father can always come in and adopt the child and can come in and take over to where there is a legal point.

Judge Hughes. But you've got to look at it from the standpoint of the child, not the father, and there is, I think, an insurmountable barrier as far as the child is concerned. The child has no remedy in Texas; now, the father—yes, but you're not dealing with the father.

Mr. Bailey. Yes, Your Honor, but again—this I think is part and parcel of it because there was an insurmountable barrier for this child to inherit also under their laws. The father had to take the incentive in Louisiana for there to be any inheritance by the [33] illegitimate child. He had taken part of this by recognizing the child, but he hadn't done some of the other steps, so until the father acted in Louisiana, there was an insurmountable barrier.

The Court said as long as there was a way that the child could possibly get support by the father's action, then this was no insurmountable barrier. This is exactly what we have here.

Judge Thornberry. How can the child here get support from the father, just the father voluntarily doing it?

Mr. Bailey. Well, I think, Your Honor, there are quite a few court cases; Judge Hughes is aware of some of them in there. There are certain ways—certain actions that can be taken which amount almost to adoption from the standpoint of support, but he could adopt the child. The fact that it's illegitimate today—he may come in, marry again, or adopt the child, or there are ways that he can provide for it in his Will such as this.

The difference in Levy was this—the effect of Levy was that there was absolutely no way at all that an illegitimate could get any benefit under that statute. [34] In other words, they had either wrongful death action or not. Labine came in and said the father could have done some things that would have let this child have some rights. We submit this can happen today in Texas. The father can do some things. So there is no insurmountable barrier, and I think one thing that the Court did—the Court may have looked a little harder at Levy in this decision. I think the fact that it went four this way, one concurring, and four dissent—shows that the Court may have felt like Levy went a little further than they wanted to, that it was liable to create chaos among the States, and that they at least for the time being if not forever are going to stop Levy right where it is and not extend this doctrine, because there's no question that what the Plaintiffs are asking today is an extension of Levy.

Judge Hill. Aren't damages for wrongful death a loss of contributions and support to the child? Isn't that basically what Levy is based on—the lack of support that the child suffered as a result of the parent's death?

In that sense we wouldn't be extending the theory of Levy beyond the scope of that decision, would we, to this fact situation? This is a support case, too, in that sense.

[35] Mr. BAILEY. Well, in that sense—yes, Your Honor, but I think you have to go a lot further than the Court did there. In other words, you don't have the wrongful death situation in Louisiana unless they enact the statute. In other words, they were completely innocent. There was absolutely no way in a wrongful death situation, regardless of what anybody did, that an illegitimate child could ever get any support. We submit that this is not the case here in Texas.

Judge HILL. Well, it was until the Levy case, wasn't it?

Mr. BAILEY. No, Your Honor, as I said, there are ways so that if the father comes back and decides to legitimatize the child or to adopt the child, there are ways. Here there was nothing that anybody could do to alleviate the denial of this money under the Wrongful Death statute as to an illegitimate—that was it, but there are ways here just as there are ways in this—you see, what happened in this other case—the way the Louisiana statutes were, the father had to do some things before the child could collect from the Estate. He had done some of these but not all of them. The Court says that while this is too bad that they're so stringent and you've got to have some money, that "we think the State has the control in this area; there is [36] no Fourteenth Amendment, due process, or equal protection question here."

We submit this is exactly what we've got here because there are things right now under our law in Texas that would allow the father of an illegitimate child to come in and assume the responsibility and put him to the point where he is liable under 4.02 and 602 if he doesn't support the child, and this, we submit, is identical in this respect to Labine, in that there is no absolute prohibition against him doing that in Texas. I think we would have a Levy case if the State of Texas had a statute that said this—a father of an illegitimate child cannot adopt the child, cannot assume the responsibility of it. Then there would be an absolute insurmountable barrier for this child to ever collect from his natural parents, and I think this is it.

Judge THORNBERRY. Mr. Bailey, may I ask you a question—you don't contend here, do you, assuming that there is jurisdiction on all other grounds—you have argued against that—

that the District Attorney would if requested bring action against this father?

Mr. BAILEY. Well, of course I can't speak for the District Attorney. I would say this, Your Honor. He could do this, but here is what he's faced with. If the District Attorney brought a criminal complaint [37] under 602 against one or more of these particular plaintiffs, the father of their child, then he could bring this—nothing in the world would stop him, but the case of *Beaver* versus *State* would throw out every conviction that he's gotten because it says that "child under 602 means legitimate child", so he could bring all of them he wanted to, but I doubt if he would have too good a case.

Judge HUGHES. How would you suggest that this would ever reach a Court for a decision?

Mr. BAILEY. Well, one way that it could on the criminal aspect of it, I presume, would be—and some type of mandamus may be against the District Attorney to file something like this—our Appellate Courts might ride on it there, they might not. The only other way would be for somebody charged under 602—the natural parent of a legitimate child.

If I were charged with failing to support my children under it, I presume I could raise this issue by saying it was unconstitutional because it only applies to where you've got legitimate children involved, and it's discriminatory against a father who marries—

Judge HUGHES. Actually it doesn't say that, though, it just says "children".

Mr. BAILEY. The Courts have interpreted "chil [38] dren" in each of these to mean a legitimate child just as they have in Louisiana.

We submit, really, that what we're faced with here—Counsel is well aware this is a problem that the Welfare Department is concerned with; there have been efforts to get legislation in this area; there are efforts going on today in this area to make these fathers of illegitimate children assume some of this responsibility.

I'm not up here arguing today for the moral end of this situation, because I certainly would like to see this also. I think the Welfare Department in Austin, whom I represent, would like to see some of these fathers have to assume the responsibility, but we submit that this is a matter that is best done in the legislative halls because the problems that we would have here would just be—if this Court declares these statutes we're

talking about unconstitutional—then every child support payment existing in the State of Texas today is subject to the man getting up and saying "This Court has held it unconstitutional, I'll pay no more."

Judge HUGHES. We wouldn't do that.

Judge THORNBERRY. No.

Judge HUGHES. And he's no asking for that now. In his Amended prayer he's only asking us to [39] interpret the statute, not to declare it unconstitutional.

Mr. BAILEY. Well, I am going on the basis just of course on what I was saying here.

Judge THORNBERRY. I think he said his argument as an alternative, he'd like to see it stricken down.

Mr. BAILEY. Yes.

The other aspect of it is that I think the repercussions of this case would go beyond this also, because I think the minute that this statute goes or this interpretation gets this way, unless it's by statute, we're going to see some people in the welfare area that are going to be hurt by this, too, because if that illegitimate father has responsibilities for that child—we may get into the area that these children that are now receiving this benefit are no longer eligible because of both the State and Federal laws in this area.

For this reason we submit that the Court should not take jurisdiction, we do not believe that it has been shown in this case, and that on the merits that they are not entitled to the relief asked for.

I think that's all, Your Honor.

Mr. TURLEY. Your Honor, the Court does have [40] jurisdiction in this case, first, for the jurisdictional amount under Section 1983 "where an individual or State official acts under color of law, then the jurisdictional amount need not be specifically proven to the Court." We alleged it and we think the Court can take judicial notice that in 18 years child support payments will reach $10,000. Under Araticle 1983, then, the jurisdictional amount is here.

Now, with respect to whether Henry Wade is a proper State official for a 3-Judge injunction, he is, Your Honor. He is a State official—granted he's locally elected, but he applies State law and as such under *Spellman* versus *Motor Sales*—*Spellman Motor Sales* versus *Dodge* in 1935 the Courts clearly held that he's a proper State official for this kind of a court, so this Court does have jurisdiction to consider the matter.

I grant the Court that what we're talking about is something very serious. We've got 19,000 illegitimate children born in this State every year and the rate is increasing. It's not an easy problem to deal with. However, I submit to the Court likewise that simply because it's a hard problem, might involve some welfare problems, and might involve perhaps changing up the procedure whereby the Criminal Attorney brings [41] actions is nonetheless no reason at all to just completely ignore the Constitutional rights of these children. I don't think the Court has ever done it, and I don't think they will in this instance.

Incidentally, Your Honor, I'm not withdrawing the pleading; I would hate to see the Court have to go so far in this instance and I quite frankly don't believe the Court need go so far as to strike down and hold as unconstitutional the two statutes involved, but because of the magnitude of the problem, the serious Civil rights involved, I am willing and have asked the Court if that be necessary, that that be done, for the simple reason, Your Honor, that this State has never enacted any rights to protect in child support matters the rights of the illegitimate.

*Beaver* versus *State* was decided in 1923. The Legislature hasn't done a thing about it since. The very thing that the Court did in *Beaver* versus *State* when they said "Children means legitimate children"—I am simply asking this Court to say that the word "children", if it means legitimate alone is unconstitutional. That's all I'm asking this Court to do and I think that's all we have to do in this instance.

The State of Texas has admitted in their Brief and admitted in their oral argument that the situation [42] before us is that it is morally right that the father support the illegitimate child.

Under these circumstances, Your Honor, I simply fail to see—when the only other possible remedy is for this person to some way or another go to Henry Wade's office and file an action and some way or another go to the District Court and file a Civil Action and work these through at trials in the trial courts and through the Courts of Civil Appeals and the State Supreme Court and then into the Federal Appellate Courts and finally perhaps the United States Supreme Court—it seems to me that the State of Texas has made it abundantly clear throughout the years—the Courts and then the Legislature, and the Attorney General does not deny the fact that there is

no right of support for children in this State. I simply want to shortcut this matter, which I think the Rules of Federal Procedure do provide.

Judge THORNBERRY. Thank you. The Court will take the case under advisement.

We thank Counsel on both sides.

The MARSHAL. Court is adjourned.

(These 3-judge proceedings concluded at this time.)

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[Certification of record omitted.]

ORDER GRANTING LEAVE TO FILE PLAINTIFF'S THIRD AMENDED COMPLAINT

[Number and title omitted] (Filed May 26, 1971)

Came forth on this 26th day of May 1971, the Plaintiff, submitted in letter form her request to file her Third Amended Complaint, and the Court after having considered said request is of the opinion that it should be granted, and leave is hereby extended to the Plaintiff to file her Third Amended Complaint.

SARAH T. HUGHES,
*Judge.*

PLAINTIFF'S THIRD AMENDED COMPLAINT

[Number and title omitted] (Filed May 26, 1971)

I. PARTIES

1. Plaintiff, Linda R. S. is a citizen of the State of Texas, and a resident of Dallas County, Texas.

2. Plaintiff's minor daughter is a citizen of the State of Texas and resides with Plaintiff in Dallas County, Texas.

3. Plaintiff sues on behalf of herself, her minor daughter, and on behalf of all other women and minor children who have sought, are seeking, or in the future will seek to obtain support for so-called illegitimate children from said child's father. The number of members of the class is large and joinder of all members is impractical; there are questions of law and fact common to each class; the claims of Plaintiff are typical of such class; and the named Plaintiff will fairly and adequately protect the interests of the class.

4. Defendant, Richard D., is a citizen of the State of Texas and a resident of Dallas County, Texas.

5. Defendant, State of Texas, is a party hereto in that certain laws and enactments of the State of Texas infringe the Federal Constitutional rights of Plaintiff, Plaintiff's minor daughter, and others similarly situated. Notice of this suit is given to Honorable Preston Smith, Governor of the State of Texas, and to Honorable Crawford Martin, Attorney General for the State of Texas.

6. Dallas County District Attorney, Henry Wade, who is given the duty to enforce in Dallas County the provisions of the Texas Penal Code, Article 602, is made a Defendant herein.

7. Justice Robert Calvert, Chief Justice of the Texas Supreme Court, the highest Court in the State of Texas and which Court has the duty of interpreting and applying Civil Statute, Article 4.02 of the Texas Family Code, is made a Defendant herein.

8. Crawford Martin, Attorney General for the State of Texas, has been given notice of this suit and appeared herein, and is made a Defendant herein.

## II. JURISDICTION

1. Plaintiff invokes the jurisdiction of this Court under the NINTH and FOURTEENTH Amendments to the United States Constitution; and under Title 28, United States Code, Sections 1331, 1343, 2201, 2202, 2281, and 2284; and Title 42, United States Code, Section 1983.

2. Plaintiff seeks (a) a Declaratory Judgment that Article 4.02 of the Texas Family Code, and Article 602 of the Texas Penal Code are unconstitutional on their face, and have been unconstitutionally applied so as to systematically exclude unwed mothers and children of unwed mothers from the benefits of such laws; (b) a permanent mandatory injunction to prevent the further exclusion of such class of persons from the protection of the laws of the State of Texas.

3. Although this suit is concerned with a deprivation of Plaintiff's civil rights and as such is an exception to the $10,000.00 jurisdictional amount, Plaintiff would nonetheless show the Court that more than $10,000.00 is involved in depriving Plaintiffs of Defendant, Richard D.'s support.

III. STATUTES

1. Article 4.02 of the Texas Family Code provides:

"*Each spouse has the duty to support his or her minor children.* The husband has the duty to support the wife and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to those to whom support is owed."

2. Article 602 of the Texas Penal Code provides:

"Any husband who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years."

IV. FACTS

1. Plaintiff and Defendant, Richard D., cohabited for a period of several months in 1969 and 1970 during which time Plaintiff became pregnant by the Defendant, Richard D.

2. On October 3, 1970, Plaintiff gave birth to a girl baby, of which child Richard D. is the father.

3. Although requested by Plaintiff many times to do so, Defendant, Richard D., has refused to either marry Plaintiff or support their minor daughter.

4. Plaintiff has very little money and cannot support the parties' minor daughter in a manner equal to the opportunities and privileges of a father supported child.

5. Plaintiff's minor daughter is not entitled to receive and in all reasonable probability will not receive support from any source other than her natural parents.

6. The laws of Texas as written and as applied give the Plaintiff's child no rights of support from her father, but said laws do provide other children that right against a father who has married the child's mother.

7. Unless this Court requires Defendant, Richard D., to contribute to the support and upkeep of his minor daughter said child will experience great economic hardship for the next eighteen (18) years, which hardships she would not otherwise

have to endure, and which will deprive her of equal privileges and opportunities of similarly situated father supported children.

8. Plaintiff, Linda R. S. has been and will continue to be subjected to economic coercion by the State of Texas in that she recognizes that her child cannot be raised with equal rights and opportunities such as similarly situated father supported children.

9. Because of such state enforced economic hardship, Plaintiff and others similarly situated are not permitted to freely elect between keeping and rearing their child and the alternatives of placing that child for adoption or even having its birth aborted.

10. Unless Defendant, Richard D., be required to contribute to the support of such child, Plaintiff will be required to choose between giving her child up for adoption and rearing by other parties, or subjecting the child to a life of unequal rights, unequal opportunities, and unequal support as compared to father supported children.

11. This is a proper case to be heard by a Three-Judge Court in that Plaintiff is challenging state statutes as invalid on their face under the United States Constitution, and is seeking an injunction against the discriminatory enforcement of said statutes, and is of significant public concern.

12. On May 25, 1971, Plaintiff made application to Dallas District Attorney, Henry Wade, for enforcement of the provisions of Article 602 of the Texas Penal Code against Defendant, Richard D. The District Attorney's Office refused to accept the case because Plaintiff and Defendant, Richard D., had never married and, therefore, according to the District Attorney, Plaintiff was not entitled to the benefits of Article 602. An Affidavit from the District Attorney's Office is attached hereto.

## V. CAUSES OF ACTION

1. The child support provision of Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code are unconstitutional on their face.

2. Said statutes deprive unwed pregnant women and unwed mothers of their federal constitutional rights as guaranteed in the NINTH and FOURTEENTH Amendments to the United States Constitution, to-wit:

A. Said Texas statutes, laws and customs have deprived Plaintiff of the fundamental rights of all women to freely choose whether to bear children.

B. They deprive Plaintiff of the fundamental right of all mothers to freely choose whether to keep their children.

C. Said statutes, laws and customs deny Plaintiff equal protection of the laws.

D. Said Texas statutes, laws and customs deny, without due process of law, Plaintiff's rights to have and keep her child.

3. Said Texas statutes, laws and customs deprive Plaintiff's minor daughter, and other children of unwed mothers of their Federal Constitutional rights protected by the NINTH and FOURTEENTH Amendments to the United States Constitution, to-wit:

A. They deprive said child of the equal protection of the laws.

B. They deprive said child of the fundamental right of all children to support from their natural father.

C. Said statutes deny, without due process of law said child's fundamental rights of equal opportunities and privileges of other children receiving support from their fathers.

4. Provisions of Article 4.02 of the Texas Family Code and of Article 602 of the Texas Penal Code discriminate against the Plaintiff's minor child solely because of circumstances surrounding the child's conception. Said statutes are not supported by any overriding and compelling state interest and in fact operate to the detriment of the citizens of Texas who often must ultimately bear the support of said children.

## VI. RELIEF REQUESTED

1. Plaintiff prays that a Three-Judge Court be convened to hear this cause.

2. Plaintiff prays that a Declaratory Judgment be issued holding the Texas Child Support Laws unconstitutional in their exclusion of children of unwed parents.

3. Plaintiff prays that a permanent mandatory injunction issue, requiring the State of Texas and its state officers to cease their discriminatory application of Child Support Laws, and that Defendant, Richard D., be required to pay a reasonable amount of money for the support of his child, that De-

fendants be compelled to pay costs of Court, and such further relief at law or in equity as Plaintiff may be entitled to receive.

Respectfully submitted,

McKool, McKool, Jones, Shoemaker and Turley.

By WILDER TURLEY,
*Attorney for Plaintiff.*

[Certificate of service omitted.]

HENRY WADE,
DISTRICT ATTORNEY,
*Dallas Tex., May 25, 1971.*

Re Linda R. Shell, Complaint for nonsupport.

This office is unable to take any action against Kenneth R. Defenbaugh, alleged to be the father of Kendra Renee Defenbaugh, a female child born October 3, 1970, for enforcement of child support.

This policy is due to caselaw construing Art. 602 of the Penal Code to be inapplicable to fathers of illegitimate children.

CATHARINE T. HILL,
*Assistant District Attorney.*

Subscribed and sworn to before me, this 25th day of May, 1971.

RUBY L. MIMMS,
*Notary Public in and for Dallas County, Texas.*

(Affidavit referred to in paragraph 12, page 4, of plaintiff's third amended complaint.)

DEFENDANTS' MOTION IN OPPOSITION TO PLAINTIFFS' MOTION TO AMEND PLEADINGS AND TO OFFER ADDITIONAL EVIDENCE

[Number and title omitted] (Filed June 3, 1971)

To the Hon. Judges of said court: Come now the Defendants herein and in reply to Plaintiffs' Motion to Amend Pleadings and Introduce Additional Evidence, file this their motion in opposition thereto and as grounds therefor would respectfully show the Court as follows:

I.

The instant proceeding was filed on the 3rd day of December, 1970, and the initial answer was filed shortly after the 21st day of December, 1970.

II.

That on the 21st day of January, 1971, a preliminary pretrial conference was held before the Court at which time the attorneys informed the Court that the case could and would be submitted upon stipulations.

III.

That on or about the 22nd day of March, 1971, stipulations agreed upon were filed with the Court.

IV.

That on the 16th day of April, 1971, the case was tried before the Court after announcements of ready by all parties.

V.

That during the course of such trial the Plaintiffs did not request permission to make any trial amendments of their pleadings nor did the Plaintiffs seek a delay of the trial on the grounds that certain evidence was unavailable at that time.

VI.

That thirty-nine (39) days after the trial of the case, the Plaintiffs now seek to amend their pleadings to include certain additional factual allegations and submit such evidence to the Court for consideration.

VII.

That such evidence is not newly discovered evidence that was unavailable to Plaintiffs at the time of trial. Such evidence was not even in existence at the time of trial. Such evidence deals with events occurring after the trial of the case and was in fact manufactured or created by the very action of the Plaintiffs.

VIII.

That the actions taken by the Plaintiffs could have been taken prior to the filing of this suit or during its pending for trial.

IX.

That this attempt to inject this created evidence at this stage of the proceedings constitutes nothing more than an effort to overcome a lack of due diligence in presenting the case to the Court upon trial or an effort to bolster and improve the record after trial.

X.

Defendants submit that nothing in the Rules of Federal Procedure allows or authorizes such patently unjust and unfair procedure, especially in view of any allegation or showing that such evidence could not have been available at the time of trial with the exercise of any degree of diligence.

XI.

That this piecemeal manner of presenting Plaintiffs' case for trial subjects the Defendants to the alternative of either agreeing to the including of such evidence in the record without being able to avail themselves of the safeguards available to the Defendants pursuant to the Federal Rules of Civil Procedure pertaining to discovery, or being subjected to the additional and unnecessary expenditure of time and money to ascertain the validity of these new allegations and rebut or counter the same by evidence, briefs or argument.

XII.

Defendants submit that the Court should disallow the filing of amended pleadings or the including of additional evidence in the record without a showing by the Plaintiffs that they have exercised due diligence in making this evidence available.

Wherefore, Premises Considered, Defendants pray that Plaintiffs' Motion to Amend and Introduce Additional Evidence be denied.

CRAWFORD C. MARTIN,
*Attorney General of Texas.*
PAT BAILEY,
*Assistant Attorney General.*

Attorneys for defendants, P.O. Box 12548, Capitol Station, Austin, Texas 78711.

[Certificate of service omitted.]

MEMORANDUM OPINION AND ORDER

[Number and title omitted] (Filed November 1, 1971)

Plaintiff Linda R. S. brings this suit "on behalf of herself, her minor daughter, and on behalf of all other women and minor children who have sought, are seeking, or in the future will seek to obtain support for so-called illegitimate children from said child's father." Named as defendants are Richard D., the alleged father of plaintiff's child; the State of Texas; Dallas County District Attorney Henry Wade; Honorable Robert W. Calvert, Chief Justice of the Texas Supreme Court; and Honorable Crawford Martin, Attorney General for the State of Texas. The relief requested by plaintiff is a declaratory judgment that two Texas child support laws are unconstitutional in their exclusion of children of unwed parents, a permanent mandatory injunction requiring the State of Texas and its officers to cease their alleged discriminatory application of the child support laws in question, and an order requiring Richard D. to pay child support.

Plaintiff alleges that she lived with defendant Richard D. for several months, became pregnant by him, and gave birth to his baby girl in late 1970. Plaintiff contends that the father refuses either to marry her or to support the child. She has requested that this three-judge court be convened to consider her contention that two Texas statutes are unconstitutional. The statutes in effect require fathers to support their legitimate but not their illegitimate children. The Court is of the opinion that this is not a proper case for three judges and remands to the District Judge to whom the application for relief was originally presented.

Congress passed the first three-judge court statute in reaction to the United States Supreme Court's decision in *Ex parte Young*, 209 U.S. 123 (1908). In *Young* a federal district court temporarily enjoined the Minnesota Attorney General from enforcing Minnesota's maximum rates for railroad operation. The Supreme Court upheld the district court's power to grant the injunction and a flood of litigation by utilities followed. Many district courts struck down state statutes with abandon, and in 1910 Congress required that three judges were necessary to enjoin a state official from enforcing a state statute. The

present three-judge court statute, 28 U.S.C. § 2281, is quoted below.[1]

Because of the burdensome aspects of three-judge courts, the Supreme Court has narrowly construed § 2281. The following conditions must be met for a three-judge court to be properly convened:

(1) An interlocutory or permanent injunction must be sought.

(2) The injunction must be sought to restrain the enforcement of a state statute.

(3) The injunction must be sought against a state official.

(4) The statute must be challenged on grounds of federal unconstitutionality.

Plaintiff has challenged the constitutionality of two Texas statutes.

ARTICLE 602

Article 602 of the Texas Penal Code provides:

> Any husband who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any *parent* who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her *child or children* under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction shall be punished by confinement in the County Jail for not more than two years. (Emphasis added.)

This three-judge court has been properly convened insofar as the challenge to Article 602 is concerned.

Article 602 provides that any "parent" who fails to support his "children" is subject to prosecution. However, Texas courts have held that only parents of legitimate children are amenable to prosecution under the statute. *Beaver v. State*, 256 S.W. 929 (Tex. Crim. App. 1923). Therefore the proper party to challenge the constitutionality of Article 602 would be a parent of a legitimate child who has been prosecuted under the statute. Such a challenge would allege that because the parents of

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[1] 28 U.S.C. § 2281 provides:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

illegitimate children may not be prosecuted, the statute unfairly discriminates against the parents of legitimate children.

Linda R. S., plaintiff, cannot be prosecuted under the statute because the minor child involved in this case is illegitimate. Plaintiff therefore lacks standing to challenge the statute and this portion of her case must be dismissed.

## ARTICLE 4.02

Article 4.02 of the Texas Family Code provides:

> Each spouse has the duty to support his or her minor children. The husband has the duty to support the wife and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to those to whom support is owed.

This statute is enforceable through a civil suit for damages against a defaulting spouse. There is no state official involved in the enforcement of Article 4.02. Since § 2281 provides that a three-judge court is proper only to enjoin a state official from enforcing a state statute, a three-judge court may not consider the challenge to Article 4.02. This portion of the case must be remanded to the judge to whom the application for injunction was originally presented.

We note in passing a further difficulty with this case. Plaintiff is requesting that a mandatory injunction issue against Henry Wade, the Dallas County District Attorney, ordering him to prosecute Richard D. and, apparently, all other fathers of illegitimate children who have refused to support them. Richard D. has never appeared in this case. Moreover, Linda R. S. and the State of Texas, without Richard's participation, stipulated that Richard is the father of Linda's child.

The portion of the case challenging Article 602 has been properly brought before this three-judge court. The Court dismisses the challenge to Article 602 for lack of standing.

The portion of this case challenging Article 4.02 is improper for the consideration of three judges. This three-judge court disbands as to the challenge to Article 4.02 and remands this portion of the case to the judge to whom the application for injunction was originally presented for further proceedings.

It is so ordered.

DISSENTING OPINION

[Number and title omitted] (Filed November 1, 1971)

Hughes, District Judge, dissenting:

I concur in the majority opinion that plaintiffs' challenge to the constitutionality of Article 602 of the Texas Penal Code has been properly brought before a three-judge court. I likewise concur in the majority opinion that the portion of the case in which the plaintiffs challenge Article 4.02 of the Texas Family Code is improper for the consideration of three judges and should be remanded to the initiating judge for further proceedings.

I dissent from the majority opinion that Linda R. S., plaintiff, for herself and her child and the class she represents, has no standing to challenge the constitutionality of Article 602 of the Texas Penal Code.

Article 602 provides in part that "any parent who shall wilfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor . . ."

The statute has been construed by Texas courts to apply to the support of legitimate children but not to the support of illegitimate children. It is this application of the statute which is being challenged by Linda R. S.

Dated: Original filed November 1, 1971.

_____,
*United States Circuit Judge.*
(Original signed by Judge Thornberry.)

_____,
*United States District Judge.*
(Original signed by Judge Hill.)

_____,
*United States District Judge.*

DISSENTING OPINION

[Number and title omitted] (Filed November 1, 1971)

Hughes, District Judge, dissenting:

I concur in the majority opinion that plaintiffs' challenge to the constitutionality of Article 602 of the Texas Penal Code has been properly brought before a three-judge court. I likewise concur in the majority opinion that the portion of the case in

which the plaintiffs challenge Article 4.02 of the Texas Family Code is improper for the consideration of three judges and should be remanded to the initiating judge for further proceedings.

I dissent from the majority opinion that Linda R. S., plaintiff, for herself and her child and the class she represents, has no standing to challenge the constitutionality of Article 602 of the Texas Penal Code.

Article 602 provides in part that "any parent who shall willfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor . . ."

The statute has been construed by Texas courts to apply to the support of legitimate children but not to the support of illegitimate children. It is this application of the statute which is being challenged by Linda R. S.

The majority seeks to dismiss for lack of standing the question of the constitutional application of Article 602. This position is clearly dubious when considered in the light of recent opinions of the Supreme Court which have significantly altered the focus of the standing test. The Court in *Baker v. Carr* announced that standing exists when the complainant has "such a personal stake in the outcome of the controversy as to assure . . . concrete adverseness. . . ." 369 U.S. 186, 204 (1962). In *Flast v. Cohen* the retreat from requiring a "recognized legal interest" continued when the Court declared that if the required "nexus" exists between the claimant's status and "the nature of the . . . unconstitutional action" then "the issues will be contested with the necessary adverseness . . . to assure that the constitutional challenge will be made in a form . . . capable of judicial resolution." 392 U.S. 83, 106 (1968). The question of whether a litigant has standing does not rest on some artificial determination of whether there is a "recognized legal interest" but rather whether the Court should grant judicial review in order that justice may be done.

Since 1968 the Supreme Court has redefined the test for standing to mean that it arises when there is "injury in fact, economic or otherwise," within the "zone of interests to be protected" by the law in question. *Data Processing Serv. Organizations v. Camp*, 397 U.S. 150, 152-53 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970). In *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6 (1968), the Court stated that when a particular

statutory provision indicates a legislative intent to protect a specific interest or to prohibit certain conduct, the party injured by nonfeasance or misfeasance of the governmental agency in the enforcement of the provision has standing to require compliance with that provision. A person for whom the statute was designed to protect would have standing to bring a suit to enjoin an alleged violation of that statute.

Certainly the plaintiffs present the requisites for standing to challenge the constitutionality of Article 602. Linda R. S. and her minor daughter and the class of unwed mothers and illegitimate children have a personal stake in the constitutional application of the statute. The contested statute provides for the protection of a "child" from desertion and non-support by its "parents." The legislature demanded that parents care for and support their offspring and considered this fundamental duty so highly that it attached a criminal penalty for breaching it. As with other criminal laws, members of society have the right to expect that the agents of the state upon proper complaint will prosecute the law made by them for their protection. Clearly the statute was designed to compel parents to provide for their minor children under the threat of penal action. *Smith* v. *Given*, 97 S.W.2d 532, 534 (Tex. Civ. App. — Dallas 1936). The discriminatory practice of the governmental agencies in not prosecuting and enforcing this legislative directive against parents of illegitimate children does result in an "injury in fact" to the plaintiffs. The Supreme Court has held, moreover, that unequal treatment is indicative of an injury sufficient to support standing to sue. *Allied Stores* v. *Bowers*, 358 U.S. 522 (1959).

The plaintiffs are surely within the "zone of interest" that the legislature intended to protect with Article 602. The statute on its face protects the welfare of minor children. The plaintiffs complain, however, that the state has discriminated in the failure of the state to apply the statute to illegitimate minor children solely on the basis of their procreation by unwed parents. The plaintiffs are within the class of persons that should be protected, and the activity of the state in the application of the statute clearly results in a direct injury and a deprivation of their constitutional right of equal protection. The Court has approved standing when the parties are "directly affected by the laws and *practices* against which their complaints are directed." (emphasis added). *School District* v. *Schempp*, 374 U.S. 203, 224 n. 9 (1963).

The majority contends that only the parent of a legitimate child being prosecuted under the law has standing to challenge the discriminatory application of the statute. They say that only he is being injured by the discriminatory prosecution of Article 602. This proposition is untenable. Clearly the State's conduct in the enforcement of the challenged statute has injured the plaintiffs and adversely affected their interests.

The plaintiffs seek as relief first, a judgment declaring Article 602 unconstitutional on its face and as applied because of the systematic exclusion of unwed mothers and children of unwed mothers from the benefit of the law; and second, an injunction to prevent the further exclusion of such persons from the protection of the statute.

Jurisdiction is based on 28 U.S.C. section 1343 (3)(4).[1] The defendants contend that the plaintiffs have not alleged sufficient facts to confer jurisdiction upon the court under 28 U.S.C. section 1983. In particular, it is contended that this case is not ripe for federal action. It is true that when the case was filed, the plaintiffs had not made any attempt to file a complaint against Richard D. The Supreme Court held, however, in *Pierce v. Society of Sisters*, 268 U.S. 510, 536 (1925), that it is not necessary for the plaintiffs to attempt prosecution prior to filing suit. In *Pierce*, the plaintiff challenged the constitutionality of an Oregon statute requiring children to attend public schools at a certain age. The suit was held maintainable even though the operative date of the statute was two years away. In explaining its decision the Court said:

> "The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the Act, the injury would have become irreparable. Prevention of impending injury is a well recognised function of courts of equity." 268 U.S. at 536.

Although it is the opinion of this writer that the failure of the plaintiffs to initiate official State action to prosecute Richard D. would not defeat jurisdiction, Linda R. S. conclusively established jurisdiction when she attempted to file a complaint

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[1] 28 U.S.C. section 1343(3)(4), provides:
"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
(3) To redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens . . .
(4) To . . . secure equitable or other relief under any Act of Congress providing for the protection of civil rights.

with the District Attorney of Dallas County and he refused to prosecute. The case is therefore ripe for federal action.

In view of *Younger v. Harris*, 401 U.S. 37 (1971) and companion cases, the question of abstention must likewise be examined. These cases have narrowed the jurisdiction of federal courts in criminal cases from the broad holding of *Zwickler v. Koota*, 389 U.S. 241 (1967) which stated that a declaratory judgment was proper to construe a statute prohibiting anonymous election literature even if there was no irreparable injury to justify an injunction.

*Younger* held that when a State court proceeding is pending, an injunction is improper except "under special circumstances." In the companion case *Samuels v. Mackell*, 401 U.S. 66 (1971), it was held that a declaratory judgment is also improper when a prosecution under the challenged statute is pending in State court at the time the federal suit is initiated. 401 U.S. at 72-73.

A later Supreme Court decision *Askew v. Hargrave*, 401 U.S. 476 (1971) must likewise be examined. A Florida statute governing the school ad valorem taxes was challenged in the federal court as effecting "an invidious discrimination in violation of the Equal Protection Clause." Subsequently, a suit was filed in the State court attacking the statute primarily as violative of provisions of the Florida Constitution. In remanding the case, the Court noted that whenever State constitutional questions can be raised concerning a State law, and the federal court has been asked to construe in some way that State law, the federal court must abstain from any determination pending decision by a State court on the constitutionality of the law, even though the State constitutional issue is not being litigated in the federal court. If the State court decides the state law issues, its action "will obviate the necessity of determining the Fourteenth Amendment question." 401 U.S. at 478.

This case can be distinguished from the recent Supreme Court cases herein cited. In those cases there was a pending suit in a State court involving the same statute that was the subject of litigation in the federal court. Here there is no case pending in a State court involving Article 602 of the Texas Penal Code. Moreover, it does not appear that there is any State ground still to be litigated as in *Askew*. Previously Texas courts have considered the question of the support of illegitimate children and have held that without a specific statute requiring such

support a parent was under no duty to do so. As early as 1887 in *Lane v. Phillips*, 6 S.W. 610, the Supreme Court of Texas declared that the rules of the common law did not impose on a father the duty to support children not born in wedlock.

*Beaver v. State*, 256 S.W. 929 (Tex. Crim. App. 1923), specifically construed the statute. Defendant had been convicted of failing to support his illegitimate child. The Court in reversing said:

> "The rule of the common law has been so long established and so uniformly recognized that until the Legislature speaks in unmistakable terms showing an intention to change the rule in this state, we must perforce hold that the statute in question does not apply in the present instance."

Although *Beaver* is the only case specifically interpreting Article 602 of the Penal Code, other Texas cases [1] have on several occasions declared that under the common law a father had no duty to support his illegitimate children and without specific statutory authority Texas statutes requiring support of children applied only to legitimate children.

As indicated by this long line of cases beginning in 1887 and proceeding to 1971, it would indeed be useless for this Court to abstain to allow further litigation in the State court. Moreover, there is little likelihood of a case involving Article 602 being prosecuted because, as in this case, the District Attorney has refused to take a complaint. Certainly, this situation falls within the exception of *Younger*, *supra*, that "special circumstances" exist for the federal court not to abstain. I would so hold.

The question on the merits is whether the interpretation by Texas courts of the words "child or children" in Article 602 of the Penal Code to mean legitimate children constitutes an invidious discrimination against illegitimate children. There are three recent Supreme Court decisions crucial to a determination of this issue.

In *Levy v. Louisiana*, 391 U.S. 68 (1968) five illegitimate children filed suit in a Louisiana District Court for the wrongful death of their mother pursuant to the Louisiana wrongful death statute. The Louisiana Courts denied the relief sought

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[1] *Home of the Holy Infancy v. Kaska*, 397 S.W.2d 208 (Tex. Sup. 1965); *Curtis v. State*, 236 S.W.2d 187 (Tex. Crim. App. 1950); *G. v. P.*, 466 S.W.2d 41 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.); *Bjorgo v. Bjorgo*, 391 S.W.2d 538 (Tex. Civ. App.—Amarillo 1965).

by holding that the wrongful death statute only authorized actions in behalf of legitimate children. The Supreme Court held that such a limitation violated the Equal Protection Clause of the Fourteenth Amendment. In part, the opinion said:

> "Why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy?" U.S. at 71.

The Court also noted:

> "We have been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side." *Id.*

The case of *Glona v. American Guarantee & Liability Insurance*, 391 U.S. 73 (1968), decided the same day as *Levy*, contained a variation of the facts in *Levy*. In *Glona* a mother of an illegitimate child was denied recovery by the United States District Court of Louisiana for the death of her illegitimate child under the Louisiana wrongful death statute. The Supreme Court reversed, holding that:

> "the State denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her out of wedlock." 391 U.S. at 76.

*Labine* v. *Vincent*, 401 U.S. 532 (1971) considered Louisiana's intestate succession law. Unlike the wrongful death statute, the intestate succession laws made specific reference to illegitimate children, providing that "[i]llegitimate children, though duly acknowledged can not claim the rights of legitimate children . . . ." Plaintiff in *Labine* was an acknowledged illegitimate child; however, the father's estate was awarded to his collateral relations and the child appealed. The Supreme Court refused to invalidate the Louisiana statutory scheme, saying:

> "the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe they can provide better rules." 401 U.S. at 537.

While at first it would appear that in *Labine* the Supreme Court has overruled *Levy* and *Glona*, a closer examination reveals that it can be distinguished. In *Labine* the Court was dealing with the intestate succession laws and thus was concerned with the stability of land titles and promotion of the orderly distribution of property within the state.

After *Levy* and *Glona*, the Supreme Court of Missouri considered the question of support of illegitimate children in *R. v. R.*, 432 S.W.2d 152 (Mo. 1968), and held:

> "The decisions of the United States Supreme Court compel the conclusion that the proper construction of our statutory provisions relating to the obligations and rights of parents affords illegitimate children a right equal with that of legitimate children to require support by their father." *Id.* at 154.

Two other courts,[4] one in Colorado and the other in New York, required equal support rights for illegitimate as well as legitimate children. The New York court noted:

> "In the light of the decisions of the United States Supreme Court . . . state statutes which discriminate against children on the basis of a classification as to whether they were born in or out-of-wedlock must be held to violate the Equal Protection Clause of the Constitution. Certainly there is no area in which such statutes should be more carefully scrutinized than where the support, the care and the education of a child depend on their interpretation." 291 N.Y.S.2d at 519.

Only in cases involving inheritance statutes have the courts[5] drawn the line when it comes to applying *Levy*. These decisions, including the lower court decision in *Labine*, rested on the principle that the protection and stabilization of land titles was sufficient rational basis for discrimination against illegitimates in inheritance statutes.

Texas cases upholding the interpretation of Article 602 that it does not apply to illegitimate children rely entirely on the common law that the father is not responsible for the maintenance and support of an illegitimate child.

Traditional arguments advanced in favor of laws discriminating against illegitimates are that the discrimination promotes

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[4] *Nunez v. Nunez*, 450 P. 2d 68 (Colo. 1969); *Storm v. Nono*, 291 N.Y.S. 2d 515 (N.Y. Fam. Ct. 1968).

[5] *Strahan v. Strahan*, 304 F. Supp. 40 (W.D. La. (1969)); *Labine v. Vincent*, 220 So. 2d 449 (La. Ct. of Appeals 1969); *Of Jerry Vogel Music Co. v. Edwards D. Mark Music Corp.*, 425 F. 2d 884 (2nd Cir. 1969).

morals because it encourages marriages and deters extramarital sexual relations. While the promotion of morals is a legitimate governmental interest, it is doubtful that a rule which permits a father to avoid liability for the support of children born as a result of extramarital relations promotes this purpose. Rather it would seem to encourage promiscuity as it relieves the father of the duty to support. Nor would a rule requiring him to support his illegitimate children appear to destroy the family. There is nothing to indicate that this has been the result of those States imposing liability for the support of such children.

There is, in this writer's opinion, no rational basis for a distinction between legitimate and illegitimate children. The interpretation of the law which denies support to illegitimate children punishes a party (the child) solely because of conditions which were beyond his control and which result from the conduct of parties occurring before he came into existence.

In addition to there being no rational basis for the Texas courts' interpretation of Article 602 such manner of applying the law is an insurmountable barrier to the illegitimate child. Since 1887 Texas courts have held that the present statute does not apply to illegitimate children even though the statute itself simply says "child or children" and does not eliminate illegitimate children. There appears to be no possibility that Texas courts will change their interpretation. The legislature has been told by the courts that statutory authority must be given in order to provide support of illegitimate children. The legislature has never acted and has refused even though bills making such provision have been introduced in the legislature. The only way in which an illegitimate child can receive support at the present time under Texas laws is for the parents to marry, but the child has no control over this alternative and in this case Richard D. has refused to marry Linda R. S. Thus for all practical purposes there is an insurmountable barrier to receiving support under Texas laws for illegitimate children and specifically the child of Richard D. and Linda R. S.

I would, therefore, hold that the present interpretation of Article 602 of the Texas Penal Code by Texas courts excluding children of unwed parents as unconstitutional in violation of the Fourteenth Amendment of the United States Constitution and would issue a permanent injunction requiring State officials

to apply Article 602 in such a way as to require parents of illegitimate children to provide support.

SARA T. HUGHES,
*United States District Judge.*

APPLICATION TO APPEAL IN FORMA PAUPERIS

[Number and title omitted] (Filed November 30, 1971)

*To Hon. Judge Hughes:*

Comes now Linda R. S. and files this her Application To Proceed on Appeal In Forma Pauperis pursuant to the provisions of Title 28, Section 1915 of the United States Code. On November 1, 1971, a special three-judge Federal panel comprised of Judge Thornberry, Circuit Judge, Judge Hughes, District Judge, and Judge Hill, District Judge, ruled in a divided decision that the Plaintiff lacked standing to challenge Article 602 of the Texas Penal Code as unfairly discriminating against illegitimate children and mothers of illegitimate children. Plaintiff desires to appeal that portion of the Court's Order, but Plaintiff does not have sufficient funds with which to prosecute said appeal.

The question presented on appeal is not frivolous, but presents a substantial question. This application is made both by Linda R. S. and her minor child. Both are citizens of the United States and the only source of income for said mother and child is made up of approximately $320.00 per month net after taxes income earned by the labor of Linda R. S. Plaintiff is unable to pay costs or give security for costs of this appeal and Plaintiff has made and attached hereto her Affidavit that she is unable to pay such costs or give security therefor.

Plaintiff, Linda R. S. believes that she is, together with the class of mothers and illegitimate children represented by her, entitled to a re-dress of this case by appeal to the United States Supreme Court, and she has set forth her Affidavit as required by Title 28, Section 1915 of the United States Code setting forth the sworn facts justifying this appeal in forma pauperis.

Wherefore, premises considered, Plaintiff prays that an order be entered permitting her to appeal in forma pauperis and that she not be required to pay any filing costs, Court fees, costs of

transcripts or records, or any other such appropriate costs or expenses as may be required in this appeal.

Respectfully submitted.

*McKool, McKool, Jones, Shoemaker and Turley.*

By Windle Turley,

*Attorney for Plaintiff, Linda R. S.*

[Certificate of service omitted.]

Affidavit of Plaintiff To Proceed in Forma Pauperis

[Number and title omitted] (Filed November 30, 1971)

State of Texas,

*County of Dallas.*

My name is Linda Shell, and I am individually and on behalf of my minor daughter Kendra Renee, and on behalf of all other similarly situated mothers and children of unwed parents a Plaintiff in the above styled and numbered cause. I am, as is my minor daughter, a citizen of the United States. We have no source of income or security other than my earnings. I am a regularly employed secretary for an insurance company and my net take home earnings after taxes is approximately $320.00 per month. Neither my minor daughter nor I have money to pay costs or expenses of the appeal of this case or to give security for such costs or expenses of appeal.

I desire to appeal the decision of the three (3) Judge Federal Court rendered on November 1, 1971 in the above styled and numbered cause, wherein the Court held that I did not have standing either individually or on behalf of my minor daughter or the class of mothers and children I sought to represent, to challenge the constitutionality of Article 602 of the Texas Penal Code. I believe that said provision is unconstitutional in that it unfairly discriminates against illegitimates and children of illegitimate mothers. I believe I am entitled to redress of this issue and it is not a frivolous appeal and does present a serious and substantial question for consideration by the United States Supreme Court. I have no other means available to me to present this issue to the Court except through this appeal and I cannot pay the costs or give security for my proposed appeal.

I ask that this Court permit me to proceed forma pauperis because I am unable to give security or pay the costs or expenses of this appeal.

LINDA SHELL.

STATE OF TEXAS,
*County of Dallas.*

BEFORE ME, J. Richard Eakin, a Notary Public in and for Dallas County, Texas, on this day personally appeared Linda Shell, known to me to be the person whose name is subscribed to the foregoing, and upon her oath swore and stated that the facts set forth in the foregoing Affidavit were all true and correct, and in my presence she swore to and subscribed this Affidavit.

J. RICHARD EAKIN,
*Notary Public, Dallas County, Texas.*

My commission expires June 1, 1973.

ORDER UPON PLAINTIFFS' APPLICATION TO APPEAL IN FORMA PAUPERIS

[Number and title omitted] (Filed November 30, 1971)

Came forth on the 30th day of November, 1971, the Plaintiff and presented her Application To Appeal this cause in the United States Supreme Court In Forma Pauperis and the Court after having considered her Application and the attached Affidavit hereby granted said Application.

This application and authority to proceed in forma pauperis is granted pursuant to Section 636(b), Title 28, United States Code, and the Northern District of Texas, Misc. Order No. 732, implementing such code provision.

PATRICK H. MULLOY,
*United States Magistrate.*

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

[Number and title omitted] (Filed November 30, 1971)

I.

Notice is hereby given that the Plaintiff, Linda R. S., on behalf of herself, her minor daughter, and on behalf of all other women and minor children similarly situated, hereby appeals

to the Supreme Court of the United States from the Order entered in this action on November 1, 1971.

This appeal is taken pursuant to 28 USC Section 1253.

II.

The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, including in said transcript the following:

(1) Plaintiff's Original Complaint;

(2) Answer of Defendant State of Texas;

(3) Stipulated Statement of Facts;

(4) Affidavits in Support of Stipulated Statement of Facts;

(5) Plaintiff's Affidavit;

(6) Plaintiff's First Amended Complaint;

(7) Defendant's First Amended Answer;

(8) Original Answer of Henry Wade;

(9) Plaintiff's Third Amended Complaint;

(10) Brief of Plaintiff's;

(11) Defendant's Brief;

(12) Memorandum Opinion and Order with Dissenting Opinion;

III.

The following questions are presented by this appeal:

(1) Whether the Plaintiff individually, on behalf of her minor daughter and all other women and children similarly situated has standing to challenge the limited application by Dallas County District Attorney Henry Wade of Article 602 of the Texas Penal Code;

(2) Whether the Texas Discriminatory Exclusion of the Illegitimate child from rights of support violates her United States Constitutional guarantee of equal protection of the laws;

(3) Whether Texas refusal to permit an illegitimate child to initiate an action against her father for support denies her due process of law under the Fourteenth Amendment to the United States Constitution;

(4) Whether the illegitimate's right to support from her natural father is a fundamental right and liberty the deprivation of which violates the protections of the Ninth Amendment of the United States Constitution;

(5) Whether Texas discrimination against an illegitimate child in support matters operates to deny that child's

mother her fundamental rights under the provisions of the Ninth Amendment of the United States Constitution;

(6) Whether Texas denial to the illegitimate child of a right of support from her father constitutes a violation of the mother's due process and equal protection guarantees of the Fourteenth Amendment of the United States Constitution;

(7) Whether the Defendant Henry Wade should be enjoined from excluding illegitimates from the scope of those to be protected by the provisions of Article 602 of the Texas Penal Code;

WINDLE TURLEY,
*McKool, McKool, Jones, Shoemaker and Turley.*
Attorneys for plaintiffs, 2000 McKool Building, 5025 North Central Expressway, Dallas, Texas 75205.

[Proof of service omitted.]

SUPREME COURT OF THE UNITED STATES

No. 71–6078

LINDA R. S., ET AL., APPELLANTS,

*v.*

RICHARD D. AND TEXAS, ET AL.

Upon consideration of the motion of the appellants for leave to proceed herein in forma pauperis,

It is ordered by this Court that the said motion be, and it is hereby, granted.

APRIL 17, 1972

SUPREME COURT OF THE UNITED STATES

No. 71–6078

LINDA R. S., ET AL., APPELLANTS,

*v.*

RICHARD D. AND TEXAS, ET AL.

Appeal from the United States District Court for the Northern District of Texas.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

APRIL 17, 1972

U.S. GOVERNMENT PRINTING OFFICE: 1972